(1)

Supreme Court, U.S.
FILED

No. 011272 FEB 26 2002

OFFICE OF THE CLERK

In the

# Supreme Court of the United States

MARK LEVY, Derivatively on behalf of Immunogen, Inc.,

*Petitioner,*

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

*Respondent,*

– and –

IMMUNOGEN, INC.,

*Nominal Respondent.*

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

JEFFREY S. ABRAHAM, ESQ.
ABRAHAM & PASKOWITZ
1 Penn Plaza, Suite 1910
New York, New York 10119
(212) 714-2444

MITCHELL M.Z. TWERSKY, ESQ.
*Counsel of Record*
JACK G. FRUCHTER, ESQ.
FRUCHTER & TWERSKY LLP
1 Penn Plaza, Suite 1910
New York, New York 10119
(212) 279-5050

*Attorneys for Petitioner*

63PP

## QUESTIONS PRESENTED

Whether a holder of convertible preferred securities who is contractually limited from directly owning more than 4.9% of the issuer's common stock at *any one time* but has the right to dispose of more than 10% of the issuer's common stock within sixty days through *seriatum* conversions and sales of common stock is deemed to be the "beneficial owner" of such common stock under the plain meaning of Rule 13d-3(a) [17 C.F.R. §240.13d-3(a)] promulgated by the Securities and Exchange Commission ("SEC") pursuant to the Securities Exchange Act of 1934 (the "Exchange Act")?

Whether an interpretation of a rule advanced for the first time in an *amicus* brief more than twenty years after being promulgated by the SEC is entitled to binding deference where the proposed interpretation is contrary to the plain meaning of that rule?

Whether the SEC exceeded its statutory authority in adopting Rule 13d-3(a) as the basis for defining the term "beneficial owner" contained in Section 16(b) of the Exchange Act ("Section 16(b)") [15 U.S.C. §78p(b)]?

Whether a contractual provision specifically designed to avoid the reporting and liability provisions of the Exchange Act but which does not alter the nature of the economic interests or relationships is void either as a sham transaction or pursuant to the terms of Section 29(a) of the Exchange Act [15 U.S.C. §78cc(a)]?

## PARTIES TO THE PROCEEDINGS

All parties to this proceeding are identified in the caption. In addition to these parties, the SEC participated in the proceedings before the United States Court of Appeals for the Second Circuit below as *amicus curiae*.

## RULE 29.6 STATEMENT

In accordance with Sup. Ct. R. 29.6, petitioner states that Nominal Respondent Immunogen, Inc., on whose behalf this proceeding has been brought, does not have any publicly owned corporate parent, subsidiary or affiliate, nor does a publicly held company own 10% or more of Immuogen, Inc.'s stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDINGS | ii |
| RULE 29.6 STATEMENT | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTES AND REGULATIONS INVOLVED IN THE CASE | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR ALLOWANCE OF THE WRIT | |
| I. The Court of Appeals has Decided Important Federal Questions That Conflict With Relevant Decisions of this Court | |
| A. The Second Circuit's Decision Conflicts With This Court's Precedent on Statutory Interpretation | 5 |
| B. The Second Circuit's Decision Conflicts With This Court's Decisions on the Level of Deference to the Views of an Administrative Agency Expressed in an Amicus Brief | 8 |

II. The Court of Appeals Decision Conflicts With Decisions of Other Courts of Appeals

A. The Second Circuit's Decision on Deference to the Views of an Administrative Agency Expressed in an Amicus Brief Conflicts With a Decision of the Seventh Circuit on the Same Issue ..... 10

B. The Second Circuit Decision Conflicts With Decisions of the Seventh Circuit and First Circuit on the Issue of Sham Transaction ..... 10

III. The Court of Appeals Decision Decided an Important Issue of Federal Law Which Should be Decided by This Court

A. Proper Enforcement of the Federal Securities Laws is an Issue of National Importance ..... 11

B. Preventing the SEC From Exceeding its Statutory Authority in Promulgating Regulations is an Issue of National Importance ..... 12

CONCLUSION ..... 15

APPENDIX

Decision of the United States Court of Appeals for the Second Circuit, Decided August 23, 2001 ..... A-1

Mandate of the United States Court of Appeals for the Second Circuit, Issued August 23, 2001 ..... A-15

Order of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing, Issued November 28, 2001 ..... A-17

Opinion and Order of the United States District Court for the Southern District of New York, Dated May 8, 2000 ..... A-19

Section 16(a) of the Exchange Act, 15 U.S.C. §78p(a) ..... A-30

Section 16(b) of the Exchange Act, 15 U.S.C. §78p(b) ..... A-30

Section 3(b) of the Exchange Act, 15 U.S.C. §78c(b) ..... A-32

Section 29(a) of the Exchange Act, 15 U.S.C. §78cc(a) ..... A-32

Rule 16a-1(a)(1) promulgated under the Securities Exchange Act of 1934, 17 C.F.R. §240-16a-1(a)(1) ..... A-33

Rule 13d-3 promulgated under the Securities Exchange Act of 1934, 17 C.F.R. §240-13d-3 ..... A-36

## TABLE OF AUTHORITIES

**Page(s)**

**Cases:**

*Atchison T. & S.F. Ry. v. Pena*, 44 F.3d 437 (7th Cir. 1994) ..... 10

*Atlantic Tele-Network v. Prosser*, 151 F. Supp. 2d 633 (D.V.I. 2000) ..... 6

*Auer v. Robbins*, 519 U.S. 452 (1997) ..... 8

*Bershad v. McDonough*, 428 F.2d 693 (7th Cir 1970), *cert. denied*, 400 U.S. 992 (1971) ..... 10

*Blau v. Ogsbury*, 210 F.2d 426 (2d Cir. 1954) ..... 14

*Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) ..... 9

*Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) ..... 6, 7

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ..... 8

*Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949) ..... 14

*Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) ..... 5

*Estate of Cowart v. Nicklos Drilling Co.*, 503 U.S. 469 (1990) ..... 5

*Feder v. Martin-Marietta Corp.*, 406 F.2d 260 (2d Cir. 1969) ..... 15

*Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976) ..... 9

*Gollust v. Mendell*, 501 U.S. 115 (1991) ..... 12

*Greene v. Dietz*, 247 F.2d 689 (2d Cir. 1957) ..... 15

*Judd v. Bd. of Education*, 278 N.Y. 211 (N.Y. 1938) ..... 13

*Levy v. Southbrook International Investments, Ltd.*, 2000 U.S. Dist. LEXIS 6301 [2000] Fed. Sec. L. Rep. (CCH) ¶90,981 (S.D.N.Y. 2000) ..... 1

*Levy v. Southbrook International Investments, Ltd.*, 263 F.3d 10 (2d Cir. 2001) ..... 1, 7-10

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ..... 9

*McMahan v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044 (2d Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996) ..... 12

*Morales v. Freund*, 163 F.3d 763 (2d Cir. 1998) ..... 14

*Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) ..... 9

*Press v. Quick & Reilly, Inc.*, 218 F.3d 121 (2d Cir. 2000) ..... 8

*Rattner v. Lehman*, 193 F.2d 564 (2d Cir. 1952) ..... 14

*Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972) ..... 9

*Riseman v. Orion Research, Inc.*, 749 F.2d 915 (1st Cir. 1984) ..... 10

*Rosenberg v. XM Ventures*, 274 F.3d 137 (3d Cir. 2001) ..... 6

*Rubin v. United States*, 449 U.S. 424 (1981) ..... 5

*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ..... 9

*United States v. Mead Corp*, 533 U.S. 218, 121 S. Ct. 2164 (2001) ..... 5, 9

*White v. Indiana Travelers Assur. Co.*, 22 So. 2d 137 (La. Ct. Appeals 2nd Cir. 1945) ..... 13

*Wellman v. Dickinson*, 682 F.2d 355 (2d Cir. 1982).... 8

**Statutes:**

15 U.S.C. §78aa..... 3

15 U.S.C. §78b ..... 11

15 U.S.C. §78c(b)..... 1, 5, 12, 15

15 U.S.C. §78p(a)..... 2, 12

15 U.S.C. §78p(b)..... 2, 3, 5, 9, 13, 14, 15

15 U.S.C. §78cc(a) ..... 2, 4, 12

17 C.F.R. §240-13d ..... 7, 8, 12

17 C.F.R. §240-13d-3 ..... 2, 15

17 C.F.R. §240-13d-3(1)(i) ..... 3, 5-7

17 C.F.R. §240-13d-3(a) ..... 3, 6, 8, 10, 14

17 C.F.R. §240-13d-3(a)(2)..... 3, 6

17 C.F.R. §240-13d-3(d)(1)(i)..... 3, 5, 6

17 C.F.R. §240-16a-1(a)(1)..... 2, 6

28 U.S.C. § 1254(1)..... 1

Fed. R. Civ. P. 12(b)(6)..... 3

**Other Authority:**

15 Stock Exchange Practices, Hearing before Senate Comm. on Banking & Currency, 73 Cong., 2d Sess. 6556 (1934) ..... 13

*Filing and Disclosure Requirements Relating to Beneficial Ownership*, 1978 SEC LEXIS 1716, Exchange Act Release No. 14962, 14 SEC Docket 862, 1978 WL 14827 (April 21, 1978) ..... 7-8

*Interpretative Release on Rules Applicable to Insider Trading and Reporting*, Securities Exchange Act of 1934 Release No. 18114, 1981 SEC LEXIS 679 (Sept. 24, 1981) ..... 13

*Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Securities Exchange Act of 1934 Release 26333, 42 SEC Docket 570, 574 (1988) ..... 13

R. Korman, *Investing it: Focus on Convertible Securities; If 'Toxic Convertibles' Drive Up, Watch Out For Sinkholes*, N.Y. Times, May 17, 1998 ..... 12

R. W. Holthausen, R.W. Leftwich and D. Mayers, *Large-Block Transactions, the Speed of Response, and Temporary and Permanent Stock-Price Effects*, 26 Journal of Financial Economics 71-95 (1990) .... 14

T.G. Feldman and R.L. Teberg, *Beneficial Ownership Under Section 16 of the Securities Exchange Act*, 17 Wes. L. Rev. 1054 (1966) ..... 13, 14

J. F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) ..... 9

Petitioner Mark Levy ("Petitioner") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on August 23, 2001, and the order denying the petition for a rehearing and suggestion for rehearing *en banc*, entered on November 28, 2001.

## OPINIONS BELOW

The opinion of the Court of Appeals on the merits is reported at 263 F.3d 10 (2d Cir. 2000), and is reproduced in the Appendix at A-1[1]. The opinion and order of the United States District Court for the Southern District of New York is reported at 2000 U.S. Dist. LEXIS 6301; [2000] Fed. Sec. L. Rep. (CCH) ¶90,981 (S.D.N.Y. 2000), and is reproduced in the Appendix at A-19. The decision of the court of appeals denying the petition for rehearing and suggestion for rehearing *en banc* is unreported and reproduced in the Appendix at A-17.

## JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was issued on August 23, 2000. A timely petition for rehearing and suggestion for rehearing *en banc* was denied by that court on November 28, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED IN THE CASE

Petitioner, pursuant to Rule 14.1(f) of this Court, is attaching in the Appendix the verbatim text of the following statutes and regulations relevant to this petition for *certiorari*.

(1) Section 3(b) of the Exchange Act, 15 U.S.C. §78c(b); A-32.

---

[1] References to the Appendix hereto are cited "A-___."

(2) Section 16(a) of the Exchange Act, 15 U.S.C. §78p(a); A-30.

(3) Section 16(b) of the Exchange Act, 15 U.S.C. §78p(b); A-30.

(4) Section 29(a) of the Exchange Act, 15 U.S.C. §78cc; A-32.

(5) Rule 16a-1(a)(1) promulgated under the Securities Exchange Act of 1934, 17 C.F.R. §240-16a-1(a)(1); A-33.

(6) Rule 13d-3 promulgated under the Exchange Act, 17 C.F.R. §240-13d-3; A-36.

## STATEMENT OF THE CASE

Respondent Southbrook International Investments, Ltd. ("Southbrook") owned shares of convertible preferred stock ("Preferred Stock") of Immunogen, Inc. ("Immunogen") which if fully converted, would have resulted in Southbrook owning more than 10% of Immunogen's outstanding shares of common stock ("Common Stock"). The conversion feature of the Preferred Stock provided for its conversion into Common Stock at the lesser of: (i) a fixed rate; or (ii) a floating rate based upon the trading price of the Common Stock.

Southbrook's conversion rights were contractually limited in that Southbrook agreed not to directly own more than 4.9% of the Common Stock at *any one time*. Southbrook, however, had the right to convert the Preferred Stock through *seriatim* conversions and sales of Common Stock allowing it to dispose of more than 10% of the Common Stock *within a sixty day period*.

Southbrook purchased Common Stock through a series of conversions of the Preferred Stock at the floating rate. Within six months of these purchases, Southbrook sold Common Stock at materially higher prices earning Southbrook millions of dollars in short-swing profits.

Petitioner, acting through his counsel, wrote to the Board of Directors of Immunogen, as required by the statutory provisions of Section 16(b), demanding that Immunogen institute an action to recover these short-swing profits because Southbrook was subject to the liability provisions of Section 16(b) through its beneficial ownership of more than 10% of Immunogen's Common Stock. After Immunogen failed to take any action within a sixty day period, Petitioner commenced an action against Southbrook to recover these short-swing insider trading profits on behalf of Immunogen. Jurisdiction was based upon Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa.

Southbrook moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action asserting that the contractual provisions limiting it from directly owning more than 4.9% of the Common Stock *at any one time* precluded Southbrook from being subject to the liability provisions of Section 16(b) which apply to beneficial owners of more than 10% of an issuer's common stock. Petitioner opposed the motion and argued that the power to dispose of common stock within a sixty day period constitutes beneficial ownership. Specifically, Petitioner argued that Rule 13d-3(d)(1)(i) provides that a person is deemed the beneficial owner of a security of which that person has *the right to acquire* beneficial ownership, as defined by Rule 13d-3(a), *within a sixty day period*. Rule 13d-3(a)(2), in turn, provides a definition of beneficial ownership which includes investment power consisting of, among other things, the power to dispose of such security. Petitioner argued that since Southbrook had the power to dispose of more than 10% of the Common Stock *within a sixty day period* through *seriatim* conversions and sales of Common Stock it was a beneficial owner of more than 10% of the Common Stock within the plain meaning of the relevant rules promulgated by the SEC. In addition, Petitioner argued that the contractual terms limiting Southbrook from directly owning more than 4.9% of the

Common Stock *at any one time* were void either as a sham transaction or pursuant to the terms of Section 29(a) of the Exchange Act because they acted as an implied waiver of a provision of the Exchange Act.

The United States District Court for the Southern District of New York granted Southbrook's motion to dismiss. Petitioner appealed that judgment to the United States Court of Appeals for the Second Circuit. Following oral argument, the Second Circuit requested that the SEC submit its views in an *amicus* brief. The SEC proceeded to engage in several closed door meetings with counsel for the parties to the action as well as several other purportedly interested parties, whose precise identities are unknown to Petitioner. The SEC ultimately submitted a brief advocating that the Second Circuit affirm the District Court's ruling.

Specifically, the SEC argued that Southbrook's "right to acquire" investment power over more than 4.9% of the Common Stock was not a current right because it was contingent upon the *seriatim* conversions and sales of Common Stock. At the same time, the SEC acknowledged that Southbrook's position as a securities holder of Immunogen raised issues of concern from a policy standpoint, including Southbrook's ability to affect a change in control by serially converting and selling shares to a single person and its ability to exert sufficient influence over the issuer to gain access to inside information through, among other things, its power to dilute existing holdings and drive down the stock price. The SEC further advocated in its brief that the Second Circuit was bound by the SEC's interpretations of its regulations in its *amicus* briefs.

The Second Circuit then affirmed the judgment of the United States District Court for the Southern District of New York dismissing Petitioner's claims. Among the Second Circuit's holdings was that it was bound by the SEC's interpretation of its regulations set forth in the SEC's *amicus* briefs.

Petitioner then petitioned the Second Circuit for a rehearing and a suggestion for a rehearing *en banc*. Petitioner argued that the SEC's interpretation of its own rules was inherently flawed and contrary to their plain meaning because Rule 13d-3(d)(1)(i) refers to "the right to acquire beneficial ownership of such security . . . within sixty days." Petitioner argued that for the SEC's interpretation to be correct, the rule should refer to "the right to acquire beneficial ownership of such *securities . . . at any one time* within sixty days." In addition, based upon, among other things, the recent decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), Petitioner argued that the United States Court of Appeals for the Second Circuit had improperly declared itself bound by the interpretation of the SEC's rules and regulations set forth in the SEC's *amicus* brief. Finally, Petitioner argued that to the extent the SEC's interpretation of its rules was correct, the rules were inconsistent with the provisions and purposes of Section 16(b) and thus exceeded the SEC's limited statutory authority contained in Section 3(b) of the Exchange Act.

The United States Court of Appeals for the Second Circuit denied the petition for rehearing.

## REASONS FOR ALLOWANCE OF THE WRIT

### I. The Court of Appeals has Decided Important Federal Questions That Conflict With Relevant Decisions of this Court

#### A. The Second Circuit's Decision Conflicts With This Court's Precedent on Statutory Interpretation

The law of statutory interpretation provides that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981); *Estate of Cowart v. Nicklos Drilling Co.*, 503 U.S. 469, 475 (1990)).

This principle has been strictly adhered to in the context of the federal securities law. *See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (no cause of action was found to exist for aiding and abetting a violation of Section 10(b) of the Exchange Act because the statute did not expressly provide for such a claim). This same principle has been applied towards interpreting regulations, including those promulgated by the SEC. *See, e.g., Rosenberg v. XM Ventures*, 274 F.3d 137, 142 (3d Cir. 2001); *Atlantic Tele-Network v. Prosser*, 151 F. Supp. 2d 633, 641 (D.V.I. 2000).

The relevant regulatory language begins with Rule 16a-1(a)(1) which provides that "for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities . . . the term 'beneficial owner' shall mean any person who is deemed a beneficial owner pursuant to Section 13(d) of the Act and the rules promulgated thereunder." 17 C.F.R. §240.16a-1(a)(1); A-33. Rule 13d-3(d)(1)(i) provides that "[a] person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) ***within sixty days*** . . . ." 17 C.F.R. §240.13(d)(1)(i); A-37 (emphasis added). Rule 13d-3(a), in turn, provides that a person is a beneficial owner when that person "directly or indirectly . . . has or shares: (1) Voting power . . . and/or (2) ***Investment power*** which includes ***the power to dispose***, or to direct the disposition of, such security." 17 C.F.R. §240.13d-3(a); A-36 (emphasis added).

Thus, substituting the language "beneficial ownership of such security as defined in Rule 13d-3(a)" contained in Rule 13d-3(d)(1)(i) for the actual language of Rule 13d-3(a)(2) — which is what the plain language of the rule provides for — results in Rule 13d-3(d)(1)(i) providing that a person is deemed the beneficial owner of a security it has the right to dispose of within sixty days. Pursuant to its terms, Rule 13d-3(d)(1)(i)

***does not require*** in order for a person to be deemed a beneficial owner of a security that such person have the right to dispose of a specific percentage of the issuer's outstanding securities ***at any one time*** within sixty days. To the contrary, the rule is quite explicit in that under its terms any person with the power to dispose of ***a security within sixty days*** is the beneficial owner of ***that security***. If the SEC had intended to limit the application of Rule 13d-3(1)(i)'s definition of beneficial ownership of securities to those persons with the power to dispose of a specific percentage of the issuer's outstanding securities ***at any one time*** within sixty days, the rule should read "[a] person shall be deemed to be the beneficial owner of ***securities*** . . . which that person has the right to acquire beneficial ownership of ***at any one time*** within sixty days." The fact that the SEC did not do so should end the inquiry.

Nonetheless, contrary to this Court's holdings, the Second Circuit decided to examine the rule's perceived purpose and elevate that purpose over its plain language. In doing so, the Second Circuit walked into the precise minefield of potentially conflicting legislative purposes which so motivated this Court's adherence to the plain meaning of a statute in the *Central Bank* case. *See* 511 U.S. at 189 (legislative policies for expansive interpretation of Section 10(b) conflict with other policies favoring a more restrictive interpretation).

Specifically, the Second Circuit interpreted the policy of Section 13(d) of the Exchange Act and the rules promulgated thereunder by the SEC as being focused on "the right to acquire the ability to control." *Levy v. Southbrook International Investments, Ltd.*, 263 F.3d 10, 16 (2d Cir. 2001)(A-10). However, the actual language of the SEC release which the Second Circuit relies upon for its determination that the rule is concerned with the "right to acquire control" actually focuses on the "ability of the holder to *affect* control . . . ." *Filing and Disclosure Requirements Relating to Beneficial Ownership*, 1978 SEC LEXIS 1716 at *15, Exchange Act Release No.

14962, 14 SEC Docket 862, 1978 WL 14827 (April 21, 1978) (quoted in *Levy*, 263 F.3d at 16)(A-10)(emphasis added). *Accord, Wellman v. Dickinson*, 682 F.2d 355, 365 (2d Cir. 1982). Thus, the person owning the instrument need not be the person actually assuming control.

Here, Southbrook would have clearly been able to shift control of Immunogen based on rapid conversions of the Preferred Stock into Common Stock combined with rapid sales of the Common Stock. Therefore, the very policy which lays at the heart of Section 13(d) and Rule 13d-3(a) is, in fact, implicated in this action and, therefore, perceived policy grounds cannot be used as the basis for setting aside the plain meaning of the regulations.

### B. The Second Circuit's Decision Conflicts With This Court's Decisions on the Level of Deference to the Views of an Administrative Agency Expressed in an Amicus Brief

The Second Circuit's opinion is also notable for its complete and utter genuflection before the altar of the SEC's views expressed in an *amicus* brief as to the proper interpretation of Rule 13d-3(a) "unless plainly erroneous or inconsistent with the regulation[s]." *Levy*, 263 F.3d at 14 (A-9). *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000), upon which the Second Circuit relied, is premised upon this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997),which in turn specifically relied upon the standard for deference to administrative agencies articulated years earlier in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

However, this Court has held that the views of an administrative agency regarding the interpretation of a rule it promulgated expressed for the first time in an *amicus* brief are not entitled to *Chevron* deference. Instead, those views may be entitled to some measure of deference dependent upon, among

other things, the "persuasiveness of the agency's position." *United States v. Mead Corp*, 533 U.S. 218, 121 S. Ct. 2164, 2171 (2001)(citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)); *see also Mead*, 121 S. Ct. at 2177 n.19 and *Cf. Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988)(this Court held that it will not grant deference to an agency's litigation position advanced by its appellate counsel particularly where the position appears to be a *post hoc* rationalization for the agency's rules). Moreover, in the context of Section 16(b) litigation where the SEC has no enforcement authority, this Court has noted that "we would not afford [the SEC's views] the deference to which the views of the agency administering a statute are usually entitled. . . ." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 259-60 (1976) (citing *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418 (1972)).

The position advocated by the SEC in its *amicus* brief and adopted by the Second Circuit in *Levy* also conflicts with well-settled principles of constitutional jurisprudence. SEC regulations promulgated pursuant to clear statutory authority have the force of law. *See Mead*, 121 S. Ct. at 2172. As such, the judiciary is the sole branch of government with the authority to interpret these regulations. *Accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995). Allowing a regulatory agency to interpret regulations having the force of law in a manner subject to binding deference when a case or controversy arises effectively eliminates the constitutionally required Separation of Powers, by permitting both legislative and judicial powers to be contained within one administrative agency. *See generally* J. F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 647-648 (1996).

## II. The Court of Appeals Decision Conflicts With Decisions of Other Courts of Appeals

### A. The Second Circuit's Decision on Deference to the Views of an Administrative Agency Expressed in an Amicus Brief Conflicts With a Decision of the Seventh Circuit on the Same Issue

Rule 13d-3(a) as to which the SEC proffered its opinions for the first time in its amicus brief on March 15, 2001, were adopted in 1977 — some twenty four years earlier. In a remarkably similar setting the Seventh Circuit in an *en banc* held that an interpretation made by an administrative agency twenty three years after a rule was promulgated was not entitled to deference. *See Atchison T. & S.F. Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994) (*en banc*).

### B. The Second Circuit Decision Conflicts With Decisions of the Seventh Circuit and First Circuit on the Issue of Sham Transaction

The Second Circuit, without any discussion on the issue, affirmed the District Court's decision that the sham transaction doctrine is not a basis for setting aside the provisions purportedly limiting Southbrook's ownership interest in Immunogen. *See*, *Levy*, 263 F.3d at 17-18 (A-13). The Seventh Circuit has held to the contrary that an "insider should not be permitted to speculate with impunity by varying the paper form of his transactions." *Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir 1970), *cert. denied*, 400 U.S. 992 (1971). The First Circuit has reached a similar conclusion. *See Riseman v. Orion Research, Inc.*, 749 F.2d 915, 921 (1st Cir. 1984).

## III. The Court of Appeals Decision Decided an Important Issue of Federal Law Which Should be Decided by This Court

### A. Proper Enforcement of the Federal Securities Laws is an Issue of National Importance

Following the stock market crash of 1929 and the resulting economic depression, Congress concluded that the prices of securities on national exchanges are susceptible to manipulation and that such manipulation can precipitate, intensify, and prolong widespread unemployment as well as the dislocation of trade, transportation and industry. *See* 15 U.S.C. §78b. In an effort to insure the maintenance of fair and honest securities markets, Congress enacted The Securities Exchange Act of 1934. *Id.* Congress declared in the Exchange Act that transactions in securities conducted upon national exchanges are affected with a national public interest which make it necessary to provide for the regulation of such transactions and related matters, including transactions by officers, directors, and principal security holders. *Id.*

As this Petition is being written, the entire country is witness to the economic carnage and human suffering which results from clever contrivances designed to avoid the strictures of the federal securities laws. Enron, once one of this nation's largest, and perceived as one of its most successful, companies has collapsed in flames causing literally *billions* of dollars in investor losses and reportedly wiping out the retirement savings of thousands of Enron employees. The cause of the collapse has now been traced to a series of contrived transactions designed to avoid the full disclosure of material facts relevant to a reasonable investor's decision of whether to invest in a security.

The case at Bar is but one of a thousand mini-Enrons where an insider with a preferred status profited handsomely while public shareholders and investors were being bled dry of their

investment's value. *See, e.g.*, R. Korman, *Investing it: Focus on Convertible Securities; If 'Toxic Convertibles' Drive Up, Watch Out For Sinkholes*, N.Y. Times, May 17, 1998 at Section 3, page 4, column 1) (available on LEXIS). Here, Southbrook has avoided any disclosure of its trading in Immunogen Common Stock as required under both Section 16(a) and Section 13(d) of the Exchange Act despite having had the right to rapidly dispose of more than 10% of the Common Stock and the power to affect both control of Immunogen and the price of the Common Stock.

The Exchange Act contains a statutory provision designed to prevent such gamesmanship. Specifically, Section 29(a) prohibits any waiver of any provision of the Exchange Act. *See* 15 U.S.C. §78cc(a) (A-32). The Second Circuit has held, in another action arising under the federal securities laws, that any device which serves as a limitation on the substantive rights to maintain an action under the Exchange Act constitutes a waiver within the meaning of Section 29(a). *See McMahan v. Wherehouse Entertainment, Inc.*, 65 F.3d 1044, 1050-51 (2d Cir. 1995), *cert. denied*, 517 U.S. 1190 (1996). Properly enforced in this action, Section 29(a) would also serve to preclude Southbrook's reliance on the contractual contrivances upon which it relied to argue that it was not a beneficial owner of more than 10% of the Common Stock.

### B. Preventing the SEC From Exceeding its Statutory Authority in Promulgating Regulations is an Issue of National Importance

Section 3(b) expressly limits the SEC's authority in promulgating rules with respect to provisions of the Exchange Act to those which are consistent with the underlying statute. *See* 15 U.S.C. §78c(b). The term "such beneficial owner" as used in Section 16(b) has a statutory definition of "directly or indirectly the beneficial owner of more than 10 per centum" used in Section 16(a). *See, Gollust v. Mendell*, 501 U.S. 115, 117 (1991). The use of the term "directly or indirectly" has long been

understood to be directed at preventing avoidance or evasion of the statutory scheme. *See, e.g., White v. Indiana Travelers Assur. Co.*, 22 So. 2d 137 (La. Ct. Appeals 2nd Cir. 1945) ("the use of the term 'directly or indirectly' was designed to prevent the avoidance of the provisions of the legislation by any technical construction. . . . "); *Judd v. Bd. of Education*, 278 N.Y. 211, 212 (N.Y. 1938).

The legislative history of Section 16(b) easily supports this conclusion. Thomas Corcoran, one of the principle draftsman of the statute, testified that the statute was phrased to provide "the broadest term you can have." 15 Stock Exchange Practices, Hearing before Senate Comm. on Banking & Currency, 73 Cong., 2d Sess. 6556 (1934). Thus, beneficial owner "include[s] not only an equitable owner, but also a person who actually obtains or enjoys the benefits of security ownership, even though he has no enforceable rights thereto." T.G. Feldman and R.L. Teberg, *Beneficial Ownership Under Section 16 of the Securities Exchange Act*, 17 Wes. L. Rev. 1054, 1059 (1966).

Prior to 1991, there was no regulatory definition of "beneficial owner" and the interpretation of the term developed in the courts. *See Ownership Reports and Trading by Officers, Directors and Principal Stockholders*, Securities Exchange Act of 1934 Release 26333, 42 SEC Docket 570, 574 (1988). The definition which "developed" was a broad and multi-faceted one "includ[ing]: (1) the right to vote or control the voting of the securities; (2) the right to transfer the securities or control their transfer; (3) the right to receive the income from the securities or control the disposition of such income; and (4) the right to receive or control the disposition of the proceeds in liquidation." *Interpretative Release on Rules Applicable to Insider Trading and Reporting*, Securities Exchange Act of 1934 Release No. 18114, 1981 SEC LEXIS 679 at *14 & n.17 (Sept. 24, 1981).

Thus, courts long ago recognized that "[i]t matters not to the speculator who has title or possession or who can vote the stock or receive dividends." *Blau v. Ogsbury*, 210 F.2d 426, 427 (2d Cir. 1954). Instead, the "core object of §16(b) [is] the avoidance of short-swing profit by investors who trade in stock whose value they may be able to influence." *Morales v. Freund*, 163 F.3d 763, 766 (2d Cir. 1998).

There is no greater ability to influence the price of a stock than to sell out a massive number of the outstanding shares of common stock. *See* T.G. Feldman and R.L. Teberg, *Beneficial Ownership Under Section 16 of the Securities Exchange Act*, 17 Wes. L. Rev. 1054 at 1059-60 ("Merely by reason of the volume of his purchases and sales, the owner of large amounts of a security is able to drive the market price up or down.") Common sense is supported by academic studies on this issue. *See, e.g.*, R. W. Holthausen, R.W. Leftwich and D. Mayers, *Large-Block Transactions, the Speed of Response, and Temporary and Permanent Stock-Price Effects*, 26 Journal of Financial Economics 71-95 (1990).

Given this widespread understanding that the term "beneficial owner" was to be defined broadly, the use of the even broader term "directly or indirectly" in the statute, and the core purpose of Section 16(b), there can be no doubt that the 1934 Congress intended that the Courts look to the substance of the relationships at issue rather than the mere legal technicalities. Indeed, this devotion to the substance — rather than the legal form — of a relationship has long been the hallmark of jurisprudence in interpreting Section 16(b). *See, e.g.*, *Rattner v. Lehman*, 193 F.2d 564, 567 (2d Cir. 1952) (L. Hand, C.J., concurring); *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949).

Therefore, in the event that Rule 13d-3(a) has the meaning ascribed to it by the Second Circuit — a matter which Petitioner vigorously contests — it is inconsistent with the broad definition of the term "such beneficial owner" intentionally

provided by the 1934 Congress in adopting Section 16(b). As such, it would render the adoption of the Rule 13d-3 definition of "beneficial owner" for purposes of Section 16(b) inconsistent with the underlying statute and, thus, exceeds the SEC's authority under Section 3(b) of the Exchange Act. *Accord*, *Feder v. Martin-Marietta Corp.*, 406 F.2d 260, 268 (2d Cir. 1969) (setting aside an SEC regulation relating to the reporting of transactions by officers and directors as "arbitrarily inadequate") (citing *Greene v. Dietz*, 247 F.2d 689, 692 (2d Cir. 1957)).

## CONCLUSION

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JEFFREY S. ABRAHAM, ESQ.
ABRAHAM & PASKOWITZ
1 Penn Plaza, Suite 1910
New York, New York 10119
(212) 714-2444

MITCHELL M.Z. TWERSKY, ESQ.
*Counsel of Record*
JACK G. FRUCHTER, ESQ.
FRUCHTER & TWERSKY LLP
1 Penn Plaza, Suite 1910
New York, New York 10119
(212) 279-5050

*Attorneys for Petitioner*

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

August Term, 2000

(Argued: December 14, 2000)
(Decided: August 23, 2001)

Docket No. 00-7630

---

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

*Plaintiff-Appellant,*

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.

*Defendant-Appellee.*

– and –

IMMUNOGEN, INC.,

*Nominal-Defendant-Appellee.*

---

BEFORE: FEINBERG, PARKER, *Circuit Judges*, and COVELLO, *District Judge*.*

In this shareholder derivative suit claiming disgorgement of short swing profits, plaintiff-appellant appeals from an opinion and order of the District Court for the Southern District of New York, (Buchwald, J.), entered on May 15, 2000, granting the defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6).

AFFIRMED.

---

* The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

Jeffrey S. Abraham, Law Office of Jeffrey S. Abraham, New York, NY, *for Appellant.*

Herbert Teitelbaum, Peter Sapanoff, Noah Weissman, Robinson Silverman Pearce Aronsohn & Berman LLP, New York, NY, *for Appellee.*

Allan A. Capute, Eric Summergrad, Meyer Eisenberg, David M. Becker, General Counsel, for the Securities and Exchange Commission, *Amicus Curiae.*

PARKER, *Circuit Judge:*

Plaintiff-appellant, Mark Levy ("Levy"), is a shareholder of ImmunoGen, Inc ("ImmunoGen"). He brings this shareholder derivative action alleging that defendant, Southbrook International Investment, Ltd. ("Southbrook"), by virtue of its ownership of ImmunoGen convertible preferred shares, is a more than 10% beneficial owner of ImmunoGen common stock and realized short swing profits through the purchase and sale of ImmunoGen stock within a six month period. Plaintiff-appellant seeks disgorgement of Southbrook's profits as required by Section 16(b) of the Securities and Exchange Act of 1934 as amended, 15 U.S.C. § 78p(b) ("the Exchange Act").

Article III, Paragraph 3.10 ("the conversion cap") of the Convertible Preferred Stock Purchase Agreement between ImmunoGen and Southbrook ("the Agreement") provides that Southbrook may not convert shares to the extent that such conversion would result in Southbrook owning more than 4.9% of ImmunoGen's outstanding common stock.

There is no claim that Southbrook ever exceeded the conversion cap. Rather, plaintiff-appellant claims that due to Southbrook's ability to make limited conversions and sales over a sixty-day period it could have cumulatively owned more than 10% of ImmunoGen's common stock within the meaning of 17 C.F.R. § 240.13d-3(a) and 13d-3(d)(1)(i) ("Rules 13d-3(a) and 13d-3(d)(1)(i)," respectively). Therefore,

according to plaintiff-appellant, Southbrook is a more than 10% beneficial owner within the meaning of Section 16(b) and subject to Section 16(b) short-swing trading liability.

In the alternative, plaintiff-appellant contends that: (1) the Agreement is void as a "sham transaction"; (2) the conversion limitation provision is void pursuant to 17 C.F.R. § 240.13d-3b ("Rule 13d-3(b)");[1] and (3) the conversion limitation constitutes a waiver of section 16(b), and therefore is void pursuant to Section 29(a) of the Exchange Act as amended, 15 U.S.C. § 78cc(a).[2]

Southbrook counters that, because the conversion cap prevents Southbrook from owning, at any one point, more than 4.9% of ImmunoGen's common stock, Southbrook is not a more than 10% beneficial owner within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i), and consequently, is not subject to Section 16(b) short-swing trading liability. Additionally, according to Southbrook, because the conversion cap is valid and binding, plaintiff-appellant's alternative grounds for relief are inapplicable.

We conclude that where a binding conversion cap denies an investor the right to acquire more than 10% of the under-

---

[1] Rule 13d-3(b) reads as follows:

> Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of [sic] effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

17 C.F.R. § 240.13d-3(b).

[2] 15 U.S.C. § 78cc(a) reads as follows: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U.S.C. § 78cc(a).

lying equity securities of an issuer, at any one time, the investor is not, by virtue of his or her ownership of convertible securities, the beneficial owner of more than 10% of those equity securities within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i). We further find that the conversion cap in this case is binding, and accordingly, affirm the decision of the district court.

## I. BACKGROUND

The allegations in the complaint disclose the following. On October 16, 1996 Southbrook and ImmunoGen entered into the Agreement. Pursuant to the agreement Southbrook agreed to purchase Immunogen convertible preferred stock. The Agreement limits Southbrook's ability to convert the preferred stock to the extent that such conversion would result in Southbrook owning more than 4.9% of the common stock, at any one time. The conversion cap in part reads as follows:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

Joint App. at 36 (Convertible Preferred Stock Purchase Agreement, ¶ 3.10).

Plaintiff-appellant alleges that by February 21, 1997, Southbrook was a more than 10% beneficial owner of ImmunoGen's outstanding common stock by virtue of Southbrook's ownership of ImmunoGen convertible preferred stock. The complaint further alleges that between January 1 and February 4, 1997, Southbrook acquired ImmunoGen common shares through conversion and sold them presumably at a profit. Southbrook allegedly repeated this process between January 27 and August 4, 1997, and again in October 1997.

On December 28, 1998, plaintiff-appellant demanded that ImmunoGen's Board of Directors bring an action to cause Southbrook to disgorge its alleged, short swing profits. *See Levy v. Southbrook International Investments, Ltd.*, No. 99 Civ. 1480 NRB, 2000 WL 567008, at *2 (S.D.N.Y. May 10, 2000). By letter dated February 18, 1999, the Board refused, and this suit followed. *See id.*

Plaintiff-appellant, Mark Levy, derivatively on behalf of ImmunoGen, brought this action for disgorgement pursuant to Section 16(b) of the Exchange Act, claiming that Southbrook improperly profited from its investment in ImmunoGen because it was a more than 10% beneficial owner of ImmunoGen's common stock. *See id.* at *1. Southbrook filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim, on the ground that the conversion cap prevented it from being a more than 10% beneficial owner of ImmunoGen common stock. *See id.* Southbrook's motion to dismiss was accompanied by an affidavit and copies of various documents referred to in the complaint.[3]

The district court, in a written opinion, granted Southbrook's motion to dismiss. *See id.* It found plaintiff-appellant's beneficial ownership argument inconsistent with precedent in this Circuit. *See id.* (citing *Levner v. Saud*, 903 F. Supp. 452 (S.D.N.Y. 1994), *aff'd*, *Levner v. Prince Alwaleed*, 61 F.3d 8 (2d Cir. 1995)). Additionally, the district court concluded that "it is clear that only those holders of derivative securities, who could acquire ownership, by conversion or otherwise,

[3] We note that it was appropriate for the district court to refer to the documents attached to the motion to dismiss since the documents were referred to in the complaint. *See Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.*, 252 F.3d 127, 130 (2d Cir. 2001) ("On a motion to dismiss, the court may consider any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference.") (citation and internal question marks omitted).

of more than 10% of the common stock, at one time, are subject to § 16(b) liability." *Id.* at *10 (emphasis in original).

Finally, in response to plaintiff-appellant's alternative grounds for relief, the district court held that: (1) because conversion caps are legitimate the sham transaction doctrine was inapplicable; (2) since there was no plan or scheme to evade, and the plaintiff did not allege such in his complaint, the conversion cap was not void pursuant to Rule 13d-3(b); and (3) Section 29(a) applied only to express waivers of noncompliance, and there was no such waiver here. *See id.* at *4-5.

Plaintiff-appellant filed a timely notice of appeal on May 17, 2000. On appeal, he challenges the district court's grounds for dismissing his complaint. After hearing oral argument in this case on December 14, 2000, the panel requested and received an amicus curiae brief from the Securities and Exchange Commission which provided support for defendant-appellee's position.

## II. DISCUSSION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) de novo. *See Feder v. Frost*, 220 F.3d 29, 32 (2d Cir. 2000). Issues of statutory interpretation are also reviewed de novo. *See United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993). Although on a motion to dismiss a court must accept all factual allegations as true and draw all inferences in the plaintiff's favor, *see Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994), dismissal is appropriate if the plaintiff can prove no set of facts that would entitle him to relief. *See Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998).

Additionally, this Court is "bound by the SEC's interpretations of its regulations in its amicus briefs, unless they are plainly erroneous or inconsistent with the regulations," *Press*

*v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000) (citation and internal quotation marks omitted).

Section 16(b) of the Exchange Act compels corporate insiders to disgorge profits earned on purchases and sales of securities made within six months of each other. *See* Securities and Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b). "Liability under § 16(b) does not attach unless the plaintiff proves that there was (1) a purchase and (2) a sale of securities (3) by an officer or director of the issuer or by a shareholder who owns more than 10% of any one class of the issuer's securities (4) within a six month period." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998) (emphasis added). In other words, only officers, directors, and persons who beneficially own more than 10% of an issuer's common stock are subject to Section 16(b) short swing trading liability. Inasmuch as Southbrook is neither an officer nor a director of ImmunoGen, Section 16(b) liability can attach only if it is a more than 10% beneficial owner. Therefore, the issue presented is whether Southbrook, despite the existence of the 4.9% conversion cap, is a more than 10% beneficial owner of ImmunoGen's common stock.

A. *An Investor Subject to an Effective, Binding Conversion Cap of 4.9% is Not a More Than 10% Beneficial Owner of the Underlying Equity Stock*

Section 16(b) does not define the term "more than 10% beneficial owner," but Rule 16a-1 promulgated thereunder provides that "for the purposes of determining whether a person is a beneficial owner of more than 10% of any class of equity securities . . . the term 'beneficial owner' shall mean any person who is deemed a beneficial owner pursuant to Section 13(d) of the Act and the rules promulgated thereunder." *See* 17 C.F.R. § 240.16a-1(a)(1). Rule 13d-3, in turn, determines beneficial ownership. It states:

(a) For purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,
(2) Investment power which includes the power to dispose, or direct the disposition of, such security. . . . .

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule:
(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: (a) Through the exercise of any option, warrant or right; (b) Through the conversion of a security, . . .

17 C.F.R. 240 § 13d-3(a) and (d)(1)(i).

As noted earlier, plaintiff-appellant argues that as a consequence of Southbrook's ability to dispose of more than 10% of ImmunoGen's common stock within sixty days through seriatum conversions and sales, Southbrook cumulatively had investment power over, and consequently was the beneficial owner of, more than 10% of ImmunoGen's common stock within the meaning of Rules 13d-3(a) and 13d-3(d)(1)(i). Southbrook responds that beneficial ownership depends on its right, at a given point rather than cumulatively over a sixty-day period, to acquire through conversion more than 10% of ImmunoGen's common stock.

The SEC's position, as set forth in its amicus brief to this Court supports defendant's reading of the Rule. According to the SEC, a holder of convertible securities that is subject to a binding conversion cap is not a more than 10% beneficial

owner of the underlying equity securities. *See* Brief of Amicus Curiae the Securities and Exchange Commission (No. 00-7630) at 14. "[T]he powers and rights one has must be evaluated as of the time of a transaction to determine whether one is required to file a report under Sections 13(d) and/or 16(a), and whether the transaction is subject to short-swing profit recovery under Section 16(b)." *Id.* at 20 (internal quotation marks omitted).

Pointing out that Rule 13d-3(d)(1)(i) speaks to the "right," not the "ability" to acquire, the SEC reasons that the investor's "right to acquire" stock is at all times subject to the conversion cap. *See id.* at 21. As long as an investor holds the maximum percentage of common shares allowed pursuant to the conversion cap, the investor does not have the "right to acquire" investment power over any of the convertible shares. *See id.* at 20-21. Only when the investor divests itself of sufficient shares of common stock to reduce holdings below the cap does any additional "right to acquire" come into being. *See id.* At that point the investor does not have voting power, investment power, or the "right to acquire" those powers, with respect to the divested shares. Nor does it have the "right to acquire" those powers by virtue of its conversion rights because the cap prohibits conversion so as not to exceed holdings in excess of 4.9% of the common stock. *See id.* Accordingly, the SEC reasons, the calculation of beneficial ownership is not cumulative. As we mention above, we are bound by the SEC's interpretation unless it is clearly erroneous or inconsistent with the regulation being interpreted. *See Press*, 218 F.3d at 128 (citation omitted).

Section 13(d) and the rules promulgated thereunder are reporting requirements intended to provide investors with early warnings of potential changes in control. The SEC brief explains the application of the Section 13(d) definition of beneficial ownership to short-swing trading cases under Section 16(b). The beneficial ownership threshold established for

disclosure of shareholder control under Section 13(d) is based on, at least in part, the power over corporate affairs associated with significant equity ownership. This power also implicates access to inside information and the potential for insider trading.

Upon adoption of the "within 60 day" language in the Rule the SEC said, "Rule 13d-3(d)(1)(i) deems a person to be the beneficial owner of a security if he has the right to acquire beneficial ownership of such security, at any time within sixty days, through: . . . (b) conversion of a convertible security . . ." *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Exchange Act Release No. 14692, 14 SEC Docket 862, 1978 WL 14827 at *14 (April 21, 1978). It is obvious, given the purpose of the Rule, that the phrase "within sixty days" is intended to apply to the period within sixty days of a transaction which triggers the application of the Rule. The SEC also said that it was

> mindful that as the point in time in which the right to acquire may come to fruition is extended into the future the relation of the right's ability to influence control is correspondingly attenuated. When sixty days or less are left until the right to acquire may be exercised, the Commission believes that the ability of the holder of such right to affect control is sufficient to warrant the imposition of an obligation to file under Rule 13d-1.

*See id.* at *15.

This language suggests that the Commission was contemplating a time limitation in connection with the right to acquire the ability to control.

Viewing Rule 13d-3(d)(1)(i) in the context of its purpose, and operation, we find reasonable the SEC's reading of the Rule's "right to acquire" language. The SEC's use of "within sixty days" in Rule 13d-3(d)(1)(i) directs us to look not to the percentage of common shares cumulatively, beneficially

owned during a 60 day period as plaintiff-appellant argues, but rather, to whether the "right to acquire" inures at some point within sixty days of the acquisition. In short, "within sixty days" is a timing limit, not a direction to aggregate. Thus, beneficial ownership is determined at any one time, not cumulatively. This interpretation is consistent with the Supreme Court's instruction that Section 16(b) operate only within "narrowly drawn limits." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 251 (1976). Moreover, this interpretation limits Section 16(b) short swing trading liability to those persons in a position to influence the value of stocks because they hold or have the "right to acquire", at any one time, more than 10% of the issuer's common stock. *See Morales v. Freund*, 163 F.3d 763, 766 (2d Cir. 1999) (explaining that the object of 16(b) is to avoid short swing profits by investors that may be able to influence the value of stocks in which they trade).

Accordingly, as long as the conversion cap in this case is binding, Southbrook cannot be the beneficial owner of more than 4.9% of ImmunoGen stock. At any one time, it cannot hold more than that amount of stock because it does not have the "right to acquire" more than 4.9% of ImmunoGen common stock "within sixty days" of each divestment. Because the SEC's position is neither plainly erroneous nor inconsistent with the regulations and comports with our interpretation, we adopt it. *See Press*, 218 F.3d at 128.

We now address plaintiff-appellant's arguments concerning the validity of the conversion cap itself.

B. *The Conversion Cap in This Case is Valid and Binding*

Plaintiff-appellant claims that the conversion cap in Paragraph 3.10 of the Agreement is not valid and binding because (1) it does not actually bind the purchaser to maintain an equity holding below the 4.9% threshold and thus is void as a sham transaction; 2) the conversion limitation provision is

void pursuant to Rule 13d-3(b); and 3) the conversion limitation constitutes a waiver of Section 16(b), and therefore is void pursuant to Section 29(a) of the Exchange Act.

The conversion cap in this case provides that:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock. The company shall, promptly upon its receipt of a Holder Conversion Notice tendered by the Purchaser (or its sole designee) under the Vote Certificates, and upon its receipt of a notice of exercise under the terms of any of the Warrants, notify the Purchaser by telephone and by facsimile of the number of shares of Common Stock outstanding on such date and the number of Underlying Shares and Warrant Shares which would be issuable to the Purchaser (or its sole designee, as the case may be) *if the conversion requested in such Conversion Notice or exercise requested in such exercise notice* were effected in full, whereupon, notwithstanding anything to the contrary set forth in the Vote Certificates or the Warrants, the *Purchaser may within one Trading Day of its receipt of the Company notice required by this Section by telephone or by facsimile revoke such conversion or exercise* to the extent that it determines that such conversion or exercise would result in the Purchaser owning in excess of 4.9% of such outstanding shares of Common Stock.

Joint App. at 36-37 (Convertible Preferred Stock Agreement, ¶3.10) (emphasis added).

Relying on the permissive "may" in the above provision, plaintiff-appellant argues that the Purchase Agreement is a sham[4] because Southbrook can, in its sole discretion, decide to own more than 4.9% of the common stock by simply not revoking the relevant exercise or conversion. Southbrook responds that, to the contrary, the above provision ensures compliance by permitting Southbrook to revoke any conversion to the extent that it would result in Southbrook owning more than 4.9% of ImmunoGen's stock.

We reject plaintiff-appellant's argument and instead agree with defendant-appellee. "A writing is interpreted as a whole." Restatement (Second) of Contracts § 202(2). "The intention of the parties is not derived from sentences or clauses read in isolation, but from the instrument as a whole." *Sure-Trip, Inc. v. Westinghouse Engineering*, 47 F.3d 526, 533 (2d Cir. 1995). On the whole, the conversion cap effectuates a clear prohibition on Southbrook's ability to convert shares to the extent that conversion would result in it owning in excess of 4.9% of ImmunoGen's outstanding common stock.

Additionally, the vote certificates provide that a conversion notice, once given, is irrevocable. In light of that provision, the clause relied on by plaintiff-appellant to prove that the conversion cap is a sham is properly interpreted as an exception to the irrevocability provision providing a means of ensuring compliance with the cap by granting Southbrook the ability to revoke a requested conversion to the extent that full exercise would exceed the cap. To separate the provisions of Paragraph 3.10 from each other and the other documents that constitute the parties' agreement "in order to give them an

---

[4] "When the limitations provided by conversion caps are discovered to be illusory or a sham, they should be disregarded and the courts should analyze the case as though no such limitations existed." Amicus at 25-26; *see also Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir. 1970) ("[t]he commercial substance of the transaction rather than its form must be considered, and courts should guard against sham transactions . . . .").

assumed or [] abstract [] meaning, repugnant to their significance in the contract, would be to destroy, and not to sustain and enforce, the contract requirements," and we decline to do so. *Bowers Hydraulic Dredging Co. v. United States*, 211 U.S. 176, 188 (1908).

Additionally, plaintiff-appellant's argument is defeated by the fact that Southbrook may divest in order to stay under the cap, and therefore, it does not have to revoke to remain in compliance with the conversion cap.

Finally, we find plaintiff-appellant's remaining arguments to be without merit for substantially the same reasons as stated by the district court.

## III. CONCLUSION

For the reasons set forth above, the judgment of the district court is AFFIRMED.

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

MANDATE

SDNY
99-cv-1480
Buchwald

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 23rd day of August, two thousand and one.

BEFORE:

Hon. Wilfred Feinberg,
Hon. Fred I. Parker,
*Circuit Judges.*
Hon. Alfred V. Covello,*
*District Judge.*

UNITED STATES
COURT OF APPEALS
FILED
AUG 23 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

Docket No. 00-7630

---

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

*Plaintiff-Appellant,*

V.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

*Defendant-Appellee.*

– and –

IMMUNOGEN, INC.,

*Nominal-Defendant-Appellee.*

---

* The Honorable Alfred V. Covello, Chief Judge of the United States District Court for the District of Connecticut, sitting by designation.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by: /s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

A TRUE COPY
Roseann B. MacKechnie
by: /s/
DEPUTY CLERK

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
Clerk

DC: SDNY
DC Docket: 99-cv-1480
DC Judge: Buchwald

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of November two thousand one.

---

MARK LEVY, Derivatively on behalf of Immunogen Inc.,

*Plaintiff-Appellant,*

v.

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

*Defendant-Appellee,*

– and –

IMMUNOGEN, INC.,

*Nominal-Defendant-Appellee.*

---

dkt #:
00-7630

UNITED STATES
COURT OF APPEALS
FILED
NOV 28 2001
Roseann B. MacKechnie, Clerk
SECOND CIRCUIT

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Mark Levy

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

**FOR THE COURT:**
ROSEANN B. MACKECHNIE, Clerk
by: /s/ Arthur Heller
Arthur Heller
Administrative Attorney

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

OPINION AND ORDER

99 Civ. 1480 (NRB)

---

MARK LEVY, derivatively on behalf of Immunogen, Inc.,

Plaintiff,

– against –

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

Defendant,

– and –

IMMUNOGEN, INC.,

Nominal Defendant.

---

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT JUDGE

Plaintiff Mark Levy ("Levy"), derivatively on behalf of Immunogen, Inc., brings this action for disgorgement pursuant to Section 16(b) of the Securities and Exchange Act of 1934, as amended, 15 U.S.C. § 78p(b) ("Exchange Act"), claiming that Southbrook International Investments, Ltd. ("Southbrook") improperly profited from its investment in ImmunoGen, Inc. ("ImmunoGen" or the "Company") by virtue of being a "beneficial owner of more than 10%" of ImmunoGen's common stock. Compl. ¶ 16. Now pending is Southbrook's motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim, on the ground that it was not a beneficial owner of that amount. For the reasons set forth below, defendant's motion to dismiss is granted.

## BACKGROUND

As this Opinion is addressed to defendants' motion to dismiss, we rely exclusively on plaintiff's complaint for our recitation of the following facts. On October 16, 1996, Southbrook and ImmunoGen entered into a Convertible Preferred Stock Purchase Agreement ("the Agreement") by which Southbrook acquired various series of ImmunoGen preferred stock, yielding 9% per year, that were convertible into shares of common stock, under varying conversion formulas. Compl. ¶ 7. Plaintiff asserts that, pursuant to the Agreement, Southbrook acquired the right to own more than 10% of ImmunoGen common stock, thereby beneficially owning that amount for purposes of § 16(b) short-swing trading liability, and proceeded to trade in the Company's stock. Compl. ¶¶ 11-19.

However, the same Agreement contains a provision that prevents Southbrook from owning more than 4.9% of ImmunoGen's common stock at any time. The relevant provision, article III, paragraph 3.10 ("the conversion cap"), reads as follows:

> 3.10 *Purchaser Ownership of Common Stock.* The Purchaser may not use its ability to convert Shares hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of common stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

*See* Aff. of Kenneth Henderson ("Henderson Aff."), dated Oct. 19, 1999, Ex. 2 ("Agreement") at 13. Plaintiff does not in any way assert that Southbrook ever violated the conversion cap, but rather, that the cap did not prevent defendant from *beneficially owning* more than 10% of Immunogen's common stock. *See* Pl.'s Mem. at 7.

Plaintiff calculates that by February 21, 1997, Southbrook had the right to acquire, by exercising its conversion rights

under the Agreement, a total of 2,673,742 shares of ImmunoGen common stock, nearly 15% of the 17,933,328 shares then outstanding. Compl. ¶ 11. Plaintiff claims, based on Southbrook's ownership of convertible preferred stock, that between January 1 and February 4, 1997, while beneficially owning more than 10%, Southbrook acquired 1,384,823 common shares by conversion, and then sold them presumably at a profit. *Id.* ¶ 12. Southbrook allegedly repeated this process — trading in ImmunoGen common stock while owning the right to acquire more than 10% of it — between January 27, 1997 and August 4, 1997, and again in October 1997.[1] *Id.* ¶¶ 16, 17.

On December 28, 1998, plaintiff demanded that ImmunoGen's Board of Directors bring an action to disgorge Southbrook of its alleged, short-swing profits. Compl. ¶ 21. By letter dated February 18, 1999, the Board refused, and this derivative suit followed. Compl. ¶ 22.

## DISCUSSION

### A. *Fed. R. Civ. P. 12(b)(6) Standard*

Dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) is warranted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Cooper v. Parsky*, 140 F.3d 433,

---

[1] A cursory reading of the complaint might lead the reader to believe that Southbrook actually owned more than 10% of ImmunoGen's outstanding common stock. *See, e.g.*, Compl. ¶ 17. However, a closer examination reveals that plaintiff's calculations are based on the number of convertible preferred shares, not common shares, that Southbrook owned. For example, in reliance on a Proxy Statement filed by ImmunoGen on October 9, 1997, *see* Henderson Aff. Ex. 7, Levy alleges that Southbrook "owned 2,617,709 shares of [c]ommon [s]tock, which was more than the 10% of the 23,981,264 shares [outstanding]." Compl. ¶ 17. However, a review of note 4 of the Proxy Statement makes clear that the 2,617,709 shares are in fact the convertible preferred shares owned pursuant to the Agreement; indeed, the note makes specific reference to the Agreement as well as to its conversion cap of 4.9%. *See* Henderson Aff. Ex. 7 at 4.

440 (2d Cir. 1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In ruling on a Rule 12(b)(6) motion, a court is required "merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). Further, a court must accept all factual allegations in the complaint as true, and draw all inferences in the plaintiff's favor. *See Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994), *cert. denied*, 513 U.S. 816 (1994).

B. *Section 16(b) of the Exchange Act*

Section 16(b) of the Exchange Act provides that "a beneficial owner of more than ten percent of any class of equity security must turn over any profits earned, regardless of intent, from a purchase and sale of the securities occurring within six months." *Global Intellicom, Inc. v. Thomson Kernaghan & Co.*, 1999 WL 544708, *13 (S.D.N.Y. July 27, 1999).[2] The purpose of the statute is to "prevent[ ] the unfair use of information" which such beneficial owners, as well as officers and directors, are presumed to possess "by reason of [their] relationship to the issuer." 15 U.S.C. § 78p(b). Nevertheless, because such presumptive insiders are subject to strict liability,

---

[2] Section 16(b) reads in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner . . . any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner . . . in entering into such transaction or holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

15 U.S.C. § 78p(b). "Such beneficial owner" refers to "every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of equity security" in Section 16(a). 15 U.S.C. § 78p(a). *See Global Intellicom*, 1999 WL 544708, at *12 n.7.

regardless of their actual access to or use of inside information, section 16(b) should be narrowly construed. *See Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Courts should avoid "literal, 'mechanical' application of the statutory text in determining who may be subject to liability," and should look instead to the "evil that Congress sought to correct through § 16(b)." *Id.* (quoting *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 425 (1972)).

"Beneficial ownership" for purposes of § 16(b) liability is defined in § 13 of the Exchange Act and regulations promulgated thereunder. 17 C.F.R. § 240.16a-1(a). Specifically, Rule 13-d defines the "beneficial owner" of a security as:

> Any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:
>
> (1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or
>
> (2) Investment power which includes the power to dispose, or to direct the disposition of such security.

17 C.F.R. § 240.13d-3(b).[3] A provision of the Rule, central to the facts of this case, further states that:

> [a] person shall be deemed to be the beneficial owner of a security . . . if that person has the right to acquire beneficial ownership of such security . . . within sixty days, including but not limited to any right to acquire: (A) [t]hrough the exercise of any option, warrant or right; [or] (B) through the conversion of a security; . . .

17 C.F.R. § 240.13d-3(d)(1)(i).

---

[3] Levy concedes that because the convertible preferred shares it acquired were non-voting, only the "investment power" prong of Rule 13d-3(a) is at issue. *See* Pl.'s Mem. at 7.

C. *Levy's Theory of Beneficial Ownership*

The issue to be decided on this motion is whether Southbrook, despite the existence of the conversion limitation of 4.9%, had the right to acquire voting or investment power over more than 10% of ImmunoGen's common stock within 60 days. Plaintiff's theory is that the conversion cap only prevented Southbrook from owning more than 4.9% of ImmunoGen's common stock *at any one time;* the provision did not prevent defendant from owning, in blocks of 4.9%, cumulatively more than 10%, *at different times* during a sixty day period. *See* Pl.'s Mem. at 6-7 (alleging that Southbrook could exceed the statutory threshold "by *seriatim* converting, selling and then converting its preferred stock into more shares of the common stock").[4] We reject plaintiff's theory for several reasons.

First, contrary to plaintiff's contention that conversion caps are invalid, *see infra*, several courts in the Second Circuit have upheld conversion caps, such as the one present here, in the context of § 16(b). *See Levner v. Saud*, 903 F. Supp. 452 (S.D.N.Y. 1994), *aff'd*, *Levner v. Prince Alwaleed*, 61 F.3d 8 (2d Cir. 1995) ("*Levner II*"); *Global Intellicom*, 1999 WL 544708, at *16; *but see Schaffer v. Capital Ventures Int'l*, 98 Civ. 3900, slip op. (S.D.N.Y. Sept. 13, 1999). In *Global Intellicom*, a case involving the sale of convertible debentures, the relevant agreement provided that:

---

[4] We note, incidentally, that three separate transactions must take place in order for defendant to actually own more than 10% of the issuer's equity: it would first have to convert preferred stock equivalent to 4.9% common stock, at which point it would own 4.9% of the common stock and beneficially own another 4.9% block of readily convertible preferred stock, a total of only 9.8% (step 1); it would then have to sell some converted common stock (step 2), because of the contractual limitation, in order to pave the way for the final step, conversion of additional preferred stock (step 3). Of course, the last transaction would result in a violation of the conversion cap.

> [t]he Purchaser agrees not to convert Debentures . . . to the extent such conversion or exercise would result in the Purchaser beneficially owning (as determined in accordance with Section 13(d) of the Exchange Act and the rules thereunder) in excess of 4.999% of the then issued and outstanding shares of Common Stock . . .

*Id.* at 16. In dismissing both § 13(d) and § 16(b) claims against the defendant, Judge Cote found that "this restriction is a sufficient restraint such that [the defendant-purchaser] is not the beneficial owner of more than 5% [of the issuer's] common stock." *Id.* As the Court reasoned, "holders of freely convertible securities are generally deemed to be beneficial owners of the underlying common stock. Where conversion rights are limited, however, a holder of a convertible security may not be deemed the beneficial owner of the underlying common stock." *Id.* at 15.[5]

Similarly in *Levner*, where an owner of 4.8% of Citicorp common stock purchased convertible preferred stock equal to an additional 10% common stock, Judge Preska relied in part on a conversion cap of 10% in finding that the defendant was not the beneficial owner of more than the cap amount. 903 F. Supp. at 461. Narrowly construing § 16(b) and considering the purpose and policy underlying the statute, the District Court found that the preferred stock was not "presently convertible" to more than 10% as a matter of law, and accordingly, the defendant was not a beneficial owner of more than 10%. *Id.* at 462. On appeal, the Second Circuit affirmed "the carefully reasoned opinion of Judge Preska," agreeing that the relevant purchase agreement prevented the defendant from "convert-[ing] his preferred shares in sufficient quantity, together with

---

[5] Plaintiff's effort to distinguish Judge Cote's decision based on that case's conversion cap's specific reference to "beneficial ownership," Pl.'s Mem. at 9 (emphasis added), is unavailing as it is clear that Judge Cote's opinion did not turn on that specific language.

the common shares he already held, to render him the beneficial owner of more than 10 percent of Citicorp common stock." *Levner II*, 61 F.3d at 9.

Second, based on our independent analysis of Rule 13-d's provisions, we reject plaintiff's theory of beneficial ownership. Reading the Rule within the broader statutory framework, it is clear that only those holders of derivative securities, who could acquire ownership, by conversion or otherwise, of more than 10% of the common stock, at one time, are subject to § 16(b) liability. Notwithstanding the extremely strained interpretation of Rule 13d-3(1)(i) that plaintiff asks this Court to adopt,[6] we believe Congress intended to impose presumptive insider status and strict liability only under those circumstances. *See, e.g.*, *Morales v. Freund*, 163 F.3d 763, 766 (2nd Cir. 1999) ("core object of § 16(b) [is] the avoidance of short-swing profit[s] by investors who trade in stocks whose value they may be able to influence"). Thus we note, once again, that Southbrook was restricted by the Agreement's conversion cap from owning more than 4.9% of the outstanding common stock, at any one time, and thus was never a beneficial owner of more than the triggering amount.

Third, we consider plaintiff's theory to be extremely far reaching and overly broad. Taken to its logical extreme, the theory would seem to reach virtually any person who has the capacity (*i.e.*, wherewithal) to successively purchase and sell sufficient quantities of stock in a relatively short period of time. One might imagine a wealthy speculator who buys 1%

---

[6] According to plaintiff's construction, the "Agreement only prevented Southbrook from owning more than 4.9% of [common stock] *at any one time*. However, Rule 13d-3(1)(i) . . . speaks in terms of the shares which *could be acquired within sixty days*. As such, the particular number of shares of common stock owned on any one day is *irrelevant* to the analysis of determining the beneficial ownership for purposes of Section 16(b)." Pl.'s Mem. at 7 (emphasis in original). We simply cannot accept plaintiff's suggestion that the number of shares a person could own at a single time is irrelevant.

of a company's common stock (or an equivalent amount of derivative securities), sells it shortly thereafter for a profit, and repeats this process ten or more times over a period of sixty days. Under plaintiff's theory, the person's mere ability to acquire more than 10% at different times within sixty days, while never resulting in his owning 10% at one time, would make him the beneficial owner of more than 10%. However, our confidence that § 16(b) was not intended to reach this hypothetical investor, causes us to be wary of plaintiff's theory, since if accepted, it would extend the statute's sweep beyond those with insider power and information.

In sum, plaintiff's argument as to beneficial ownership fails because it is inconsistent with clear precedent in this Circuit, requires an improperly broad construction of § 16(b) and its accompanying regulations, and would not serve the statute's underlying purposes. Accordingly, we find that in the absence of a violation of the conversion cap, Southbrook did not beneficially own more than 4.9% of ImmunoGen's common stock.

D. *Conversion Cap is Valid and Enforceable*

Alternatively, Levy argues that the Agreement's conversion cap, ¶ 3.10, is void and unenforceable pursuant to (1) the sham transaction doctrine, (2) Rule 13d-3(b), and (3) § 29(a) of the Exchange Act. *See* Pl.'s Mem. at 10-19. These arguments are without merit. First, the sham transaction doctrine, *see Bershad v. McDonough*, 428 F.2d 693, 697 (7th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("[t]he commercial substance of the transaction rather than its form, must be considered, and the courts should guard against sham transactions. . ."), is inapplicable here, given that conversion caps have been upheld as a legitimate means of structuring a transaction to avoid § 16(b) liability. *See Global Intellicom*, 1999 WL 544708, at *1; *see also Reliance*, 404 U.S. at 422 ("liability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under Section 16(b)").

Plaintiff's argument under Rule 13d-3(b),[7] which prohibits "contract[s], arrangement[s] or device[s]" that are "part of a plan or scheme to evade the [applicable] reporting requirements," similarly fails as there is no factual basis to support the existence of such a plan or scheme to evade, here. There is no allegation in plaintiff's complaint that Southbrook failed to disclose any aspects of the ImmunoGen transaction in applicable regulatory filings, or that defendant ever attempted to conceal any matter for the purpose of avoiding its reporting obligations.

Finally, plaintiff's § 29(a) argument, raised for the first time in plaintiff's opposition brief, also fails, as the statute applies only to parties' express waivers of non-compliance with the securities laws. No such waiver is pled here. Rather, the parties entered into a transaction that has been specifically sanctioned by the courts under the securities laws.

Accordingly, plaintiff's contentions that the conversion cap present here is invalid and unenforceable, fail.

---

[7] Rule 13d-3(b), 17 C.F.R. § 240.13d-3(b), states, in relevant part:

> Any person who, directly or indirectly, creates or uses a . . . contract, arrangement or device with the purpose or effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) . . . shall be deemed for purposes of such Sections to be the beneficial owner of such security.

## CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted, and plaintiff's complaint is dismissed. The Clerk of the Court is directed to close the above captioned case.

IT IS SO ORDERED.

DATED: New York, New York
May 8, 2000

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Jeffrey S. Abraham, Esq.
Law Offices of Jeffrey S. Abraham
60 East 42nd Street, Suite 4700
New York, New York 10165

Mitchell M.Z. Twersky, Esq.
Fruchter & Twersky
60 East 42nd Street, Suite 4700
New York, New York 10165

Herbert Teitelbaum, Esq.
Robinson Silverman Pearce Aronsohn & Berman LLP
1290 Avenue of the Americas
New York, New York 10104

# TITLE 15. COMMERCE AND TRADE
## CHAPTER 2B. SECURITIES EXCHANGES
## 15 USCS § 78p (2001)

§ 78p. Directors, officers, and principal stockholders

(a) Filing of statement of all ownership of securities of issuer by owner of more than ten per centum of any class of security. Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 12 of this title [15 USCS § 78l], or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 12(g) of this title [15 USCS § 78l(g)], or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involving such equity security during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership and such purchases and sales of such security-based swap agreements as have occurred during such calendar month.

(b) Profits from purchase and sale of security within six months. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the

issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act [15 USCS § 78c note]) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

TITLE 15. COMMERCE AND TRADE
CHAPTER 2B. SECURITIES EXCHANGES
15 USCS § 78c (2001)

§ 78c. Definitions and application

(b) Power to define technical, trade, accounting, and other terms. The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this title, consistently with the provisions and purposes of this title.

TITLE 15. COMMERCE AND TRADE
CHAPTER 2B. SECURITIES EXCHANGES
15 USCS § 78cc (2001)

§ 78cc. Validity of contracts

(a) Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

# TITLE 17 — COMMODITY AND SECURITIES EXCHANGES

## CHAPTER II — SECURITIES AND EXCHANGE COMMISSION

## PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

## SUBPART A — RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

## REPORTS OF DIRECTORS, OFFICERS, AND PRINCIPAL SHAREHOLDERS

### 17 CFR 240.16a-1

§ 240.16a-1 Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(a) The term beneficial owner shall have the following applications:

(1) Solely for purposes of determining whether a person is a beneficial owner of more than ten percent of any class of equity securities registered pursuant to section 12 of the Act, the term "beneficial owner" shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder; provided, however, that the following institutions or persons shall not be deemed the beneficial owner of securities of such class held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business (or in the case of an employee benefit plan specified in paragraph (a)(1)(vi) of this section, of securities of such class allocated to plan participants where participants have voting power) as long as such shares are acquired by such institutions or persons without the purpose or effect of

changing or influencing control of the issuer or engaging in any arrangement subject to Rule 13d-3(b) (§ 240.13d-3(b)):

(i) A broker or dealer registered under section 15 of the Act (15 U.S.C. 78o);

(ii) A bank as defined in section 3(a)(6) of the Act (15 U.S.C. 78c);

(iii) An insurance company as defined in section 3(a)(19) of the Act (15 U.S.C. 78c);

(iv) An investment company registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a-8);

(v) Any person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3) or under the laws of any state;

(vi) An employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1001 *et seq.* ("ERISA") that is subject to the provisions of ERISA, or any such plan that is not subject to ERISA that is maintained primarily for the benefit of the employees of a state or local government or instrumentality, or an endowment fund;

(vii) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in paragraphs (a)(1)(i) through (ix), does not exceed one percent of the securities of the subject class;

(viii) A savings association as defined in Section 3(b) of the Federal Deposit Insurance Act (12 U.S.C. 1813);

(ix) A church plan that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 (15 U.S.C. 80a-3); and

(x) A group, provided that all the members are persons specified in § 240.16a-1(a)(1)(i) through (ix).

(xi) A group, provided that all the members are persons specified in § 240.16a-1(a)(1) (i) through (vii).

NOTE TO PARAGRAPH (A). Pursuant to this section, a person deemed a beneficial owner of more than ten percent of any class of equity securities registered under section 12 of the Act would file a Form 3 (§ 249.103), but the securities holdings disclosed on Form 3, and changes in beneficial ownership reported on subsequent Forms 4 (§ 249.104) or 5 (§ 249.105), would be determined by the definition of "beneficial owner" in paragraph (a)(2) of this section.

# TITLE 17 — COMMODITY AND SECURITIES EXCHANGES

## CHAPTER II — SECURITIES AND EXCHANGE COMMISSION

## PART 240 — GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

## SUBPART A — RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

## REGULATION 13D

## 17 CFR 240.13d-3

§ 240.13d-3 Determination of beneficial owner.

(a) For the purposes of sections 13(d) and 13(g) of the Act a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares:

(1) Voting power which includes the power to vote, or to direct the voting of, such security; and/or,

(2) Investment power which includes the power to dispose, or to direct the disposition of, such security.

(b) Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security.

(c) All securities of the same class beneficially owned by a person, regardless of the form which such beneficial owner-

ship takes, shall be aggregated in calculating the number of shares beneficially owned by such person.

(d) Notwithstanding the provisions of paragraphs (a) and (c) of this rule:

(1)(i) A person shall be deemed to be the beneficial owner of a security, subject to the provisions of paragraph (b) of this rule, if that person has the right to acquire beneficial ownership of such security, as defined in Rule 13d-3(a) (§ 240.13d-3(a)) within sixty days, including but not limited to any right to acquire: (A) Through the exercise of any option, warrant or right; (B) through the conversion of a security; (C) pursuant to the power to revoke a trust, discretionary account, or similar arrangement; or (D) pursuant to the automatic termination of a trust, discretionary account or similar arrangement; provided, however, any person who acquires a security or power specified in paragraphs (d)(1)(i)(A), (B) or (C), of this section, with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition shall be deemed to be the beneficial owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to such options, warrants, rights or conversion privileges shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.

Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1272

IN THE

# Supreme Court of the United States

MARK LEVY, Derivatively on behalf of ImmunoGen, Inc.,

*Petitioner,*

*v.*

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.

HERBERT TEITELBAUM
*Counsel of Record*
NOAH WEISSMAN
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

*Attorneys for Respondent*
*Southbrook International Investments, Ltd.*

173302

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

279

## QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that respondent Southbrook International Investments Ltd. ("Southbrook"), a holder of ImmunoGen, Inc. ("ImmunoGen") convertible preferred stock, was not a beneficial owner of more than 10% of ImmunoGen common stock, under Section 16(b) ("Section 16(b)") of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78p(b), because Southbrook's contractual right to convert preferred stock into common stock was limited to the extent that its common stock ownership would exceed 4.9% ("Conversion Cap").

2. Whether the Court of Appeals properly held, in accordance with *Auer v. Robbins*, 519 U.S. 452 (1997), that the Securities and Exchange Commission's ("SEC") interpretation of Rule 13d-3(d) is binding upon the court "unless [it is] 'plainly erroneous or inconsistent with the regulation[].' "

3. Whether the SEC exceeded its statutory authority in adopting Rule 13d-3(a) as the basis for defining the term "beneficial owner" contained in Section 16(b).

4. Whether the Court of Appeals properly affirmed the District Court's holding that the Conversion Cap does not violate either (i) the "sham transaction" doctrine because it is a legitimate means of structuring a transaction so as not to violate Section 16(b) or (ii) Section 29(a) of the Exchange Act because it does not waive compliance with the Exchange Act.

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Southbrook International Investments Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Statement of the Case | 1 |
| Reasons for Denying the Writ | 6 |
| I. The Second Circuit's Decision Does Not Conflict with Decisions of This Court | 6 |
| A. The Second Circuit's Decision Does Not Conflict With This Court's Precedent on Statutory Interpretation | 6 |
| B. The Second Circuit's Decision Does Not Conflict with This Court's Decisions on the Deference To Be Afforded an Agency's Interpretation of Its Own Rules In an *Amicus* Brief | 9 |
| II. The Second Circuit's Decision Does Not Conflict With Decisions of Other Courts of Appeals | 12 |

*Contents*

*Page*

A. The Deference Standard Identified By The Second Circuit Does Not Conflict With A Decision of the Seventh Circuit ..... 12

B. The Second Circuit Decision Does Not Conflict With Decisions in Other Circuits on the Issue of Sham Transactions .... 13

III. The Second Circuit's Decision Does Not Raise Issues of National Importance ..... 14

A. The Second Circuit's Decision Does Not Conflict With Section 29(a) of the Exchange Act ..... 14

B. SEC Rule 13d-3 Is Not Inconsistent With Section 16(b) ..... 15

Conclusion ..... 17

Appendix — Brief Of The Securities And Exchange Commission, Amicus Curiae, In Support Of Appellee On Issues Addressed ..... 1a

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Atchison, Topeka & Santa Fe Railway Co. v. Pena*,
44 F.3d 437 (7th Cir. 1994) ..... 12, 13

*Auer v. Robbins*,
519 U.S. 452 (1997) ..... i, 10, 11, 12

*Bershad v. McDonough*,
428 F.2d 693 (7th Cir. 1970) ..... 13

*Bowles v. Seminole Rock & Sand Co.*,
325 U.S. 410 (1945) ..... 10

*Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*,
467 U.S. 837 (1984) ..... 10

*Connecticut Nat'l Bank v. Germain*,
503 U.S. 249 (1992) ..... 6

*Foremost-McKesson, Inc. v. Provident Sec. Co.*,
423 U.S. 232 (1976) ..... *passim*

*Gollust v. Mendell*,
501 U.S. 115 (1991) ..... 16

*Harsco Corp. v. Segui*,
91 F.3d 337 (2d Cir. 1996) ..... 15

*Kern County Land Co. v. Occidental Petroleum Corp.*,
411 U.S. 582 (1973) ..... 6

*Cited Authorities*

*Page*

*McMahan & Co. v. Wherehouse Entm't, Inc.*,
65 F.3d 1044 (2d Cir. 1995) ..... 15

*Press v. Quick & Reilly, Inc*,
218 F.3d 121 (2d Cir. 2000) ..... 9

*Reliance Elec. Co. v. Emerson Elec. Co.*,
404 U.S. 418 (1972) ..... 11, 14

*Riseman v. Orion Research, Inc.*,
749 F.2d 915 (1st Cir. 1984) ..... 13

*Roberston v. Methow Valley Citizens Council*,
490 U.S. 332 (1989) ..... 10

*Skidmore v. Swift & Co.*,
323 U.S. 134 (1944) ..... 11

*United States v. Mead Corp.*,
533 U.S. 218 (2001) ..... 10, 11

**Federal Statutes:**

15 U.S.C. § 78cc(a) ..... *passim*

15 U.S.C. § 78p(b) ..... *passim*

17 C.F.R. 240.13d-3 ..... *passim*

17 C.F.R. 240.13d-3(a) ..... i

*Cited Authorities*


| | *Page* |
|---|---|
| 17 C.F.R. 240.13d-3(d) | 3 |
| 17 C.F.R. 240.13d-3(d)(1)(i) | 7 |
| 17 C.F.R. 240.13d-5(b)(1) | 7 |
| Fed. R. Civ. P. 12(b)(6) | 3 |
| **Secondary Sources:** | |
| *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Securities Exchange Act of 1934, Release No. 14692, 1978 SEC LEXIS 1716 (April 21, 1978) | 8 |

## STATEMENT OF THE CASE

Respondent Southbrook entered into a convertible preferred stock purchase agreement ("Convertible Agreement"), dated as of October 16, 1996, with ImmunoGen, for the purchase of ImmunoGen preferred stock ("Preferred Stock"). The Convertible Agreement provided Southbrook with a right to convert the Preferred Stock into ImmunoGen common stock ("Common Stock") and to exercise certain warrants to purchase Common Stock.

Southbrook's rights were expressly limited by the Conversion Cap in the Convertible Agreement. The Conversion Cap prohibits Southbrook from converting any shares of Preferred Stock or exercising any of its warrants to the extent that the conversion would result in Southbrook owning more than 4.9% of the outstanding shares of the Common Stock:

> The Purchaser may not use its ability to convert [Preferred Stock] hereunder or under the terms of the Vote Certificates or to exercise its right to acquire shares of Common Stock under the Warrants to the extent that such conversion or exercise would result in the Purchaser owning more than 4.9% of the outstanding shares of the Common Stock.

(Section 3.10 of the Convertible Agreement (J. A. at A-36[1]).)

The Conversion Cap's restrictions on Southbrook's right to convert were reiterated in key documents. Each certificate

1. Citation to "J. A." refers to the Joint Appendix filed by the parties before the Federal Court of Appeals for the Second Circuit.

evidencing Preferred Stock ("Convertible Certificate") contained a legend stating that it was subject to this Conversion Cap. The Conversion Cap also is reflected in the certificate of designation ("Certificate of Designation") for each class of Preferred Stock. As well, these restrictions were fully disclosed in various filings by ImmunoGen with the SEC under the Securities Act of 1933 and the Exchange Act, and in ImmunoGen's 1997 proxy statement for its annual stockholders meeting. (J. A. at A-135 - 347.)

At various times, Southbrook exercised its conversion rights, converting Preferred Stock into Common Stock. Southbrook also sold Common Stock. It was undisputed that Southbrook, consistent with the Conversion Cap, never acquired actual ownership of more than 4.9% of ImmunoGen Common Stock, much less the 10% threshold required to trigger Section 16. Also undisputed is that Southbrook never, at any time, had the power to acquire, vote, direct the voting of, dispose of, or direct the disposition of, more than 4.9% of ImmunoGen Common Stock.

After Southbrook's conversions and sales, Petitioner requested that Respondent ImmunoGen institute an action, pursuant to Section16(b), to require Southbrook to disgorge any alleged short-swing profits it earned from its investment in ImmunoGen Preferred Stock. After analyzing Petitioner's request, ImmunoGen, upon whose behalf Petitioner purports to act, declined. This derivative action ensued against Southbrook, pursuant to Section 16(b). Section 16(b) imposes strict liability upon investors that beneficially own more than 10% of a company's stock, requiring disgorgement of profits earned on purchases and sales of the securities that occur within a six-month period.

Southbrook moved, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the action. Southbrook explained that it was never at any time an actual owner and, as a result of the Conversion Cap, was never a beneficial owner of more than 10% of ImmunoGen Common Stock. Without the right to acquire more than 10% of the Common Stock at any time, including the 60 day period referenced in Rule 13d-3(d), Southbrook contended it was never a 10% beneficial owner of the Common Stock.

While Petitioner conceded that Southbrook adhered to the Conversion Cap's limitations and had not owned more than 4.9% of the Common Stock, it argued, in its opposition to the motion, that Southbrook should be deemed the beneficial owner of all the Common Stock it could acquire and dispose of, under the Convertible Agreement, through *seriatim* conversions and sales. Petitioner urged the District Court to equate 10% beneficial ownership with the power to buy relatively small blocks of stock over 60 days, if the purchases, when aggregated without regard to the sales, added up to more than 10% of the Common Stock. Thus, under Petitioner's view, Section 16(b) would apply even though an investor never at any point, within 60 days or otherwise, exceeded or had the right to exceed the statutory threshold. In addition, Petitioner argued that the Conversion Cap was void either under the Seventh Circuit's "sham transaction" doctrine or pursuant to Section 29(a) of the Exchange Act.

The United States District Court for the Southern District of New York granted Southbrook's motion to dismiss, and Petitioner appealed to the United States Court of Appeals for the Second Circuit. Following oral argument, the Second Circuit requested that the SEC submit an *amicus curiae* brief addressing, among other issues, how the Commission

interprets Rule 13d-3. Specifically, the Second Circuit invited the SEC to present its view as to whether, under Rule 13d-3, an investor that holds a convertible security may be a 10% beneficial owner of the underlying common stock, despite the existence of a 4.9% conversion cap. In its *amicus* brief, the SEC advocated that the Second Circuit affirm the District Court's ruling that a valid and binding 4.9% conversion cap prevents the investor from being, by virtue of its conversion rights, a beneficial owner of more than 4.9% of the Common Stock. (*Brief of the Securities and Exchange Commission, Amicus Curiae, In Support Of Appellee On Issues Addressed* ("*Amicus*"), dated March 2001, at 12.)[2]

According to the SEC, Rule 13d-3 defines beneficial ownership to include only voting and investment power over a security, or the "right" to acquire that security within sixty days. (*Amicus* at 17-18.) The SEC pointed out that Southbrook's right to acquire Common Stock through conversion was limited by the Conversion Cap: once Southbrook owned 4.9% of the Common Stock, the Conversion Cap prevented it from converting any more Preferred Stock. (*Id.* at 20-21.) At that point, Southbrook would have no "right" to acquire more shares unless it first divested itself of all or part of its existing holdings. (*Id.* at 21-22.) The SEC explained further that Southbrook would cease to have either voting or investment power over the divested securities within the meaning of SEC regulations. (*Id.*)

While the SEC acknowledged that an investor who could dispose serially of large amounts of stock "may be in

2. For the Court's convenience, Southbrook has lodged 11 copies of the *Amicus* with the clerk's office of the United States Supreme Court.

a position to exert influence over the company, that general observation does not displace the clear language of Rule 13d-3." (*Id.* at 12.) The SEC noted that "it would be especially inappropriate to expand that language in the context of Section 16, which the Supreme Court has long held should be construed narrowly because it is a strict liability statute." (*Id.* at 12-13.) The SEC concluded that a 4.9% conversion cap, if valid and binding, prevents the holder of a convertible security from becoming a beneficial owner of more than 4.9% of the underlying stock. (*Id.* at 24.)

The Second Circuit affirmed the District Court's judgment, and thereafter, denied a petition for *en banc* review. The Court rejected Petitioner's *seriatim* conversion argument and his argument to declare the Conversion Cap void under the "sham transaction" doctrine and Section 29(a) of the Exchange Act. In holding that Southbrook could not be the beneficial owner of more than 4.9% of the Common Stock because "it does not have the 'right to acquire' more than 4.9% of ImmunoGen common stock 'within sixty days' of each divestment," the Second Circuit analyzed the plain language of Section 16(b), Rule 16a-1, Section 13(d), and Rule 13d-3, as well as this Court's holding in *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976). The SEC's view, as expressed in its *amicus* brief and Releases, also was considered by the Court: "[b]ecause the SEC's position is neither plainly erroneous nor inconsistent with the regulations *and comports with our interpretation*, we adopt it." (Op. at A-11[3] (emphasis added).)

---

3. Citation to "Op." refers to the opinion below of the United States Court of Appeals for the Second Circuit attached as an appendix to the Petition for Writ of Certiorari.

## REASONS FOR DENYING THE WRIT

### I. The Second Circuit's Decision Does Not Conflict with Decisions of This Court

#### A. The Second Circuit's Decision Does Not Conflict With This Court's Precedent on Statutory Interpretation

Petitioner argues that the Second Circuit disregarded this Court's precedent on statutory interpretation, which states that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " (Pet. at 5, quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).) In particular, Petitioner contends that the Second Circuit's analysis of "beneficial ownership" under Section 16(b) improperly considered Congress' purpose in adopting Section 16(b). Petitioner's argument misconstrues both this Court's admonition regarding the application of Section 16(b), and the Second Circuit's analysis.

This Court repeatedly has admonished that Section 16(b) and its regulations must be construed narrowly with consideration given to Congress' purpose in enacting the statute. In *Kern County Land Co. v. Occidental Petroleum Corp.*, this Court instructed that before imposing Section 16(b) liability on a transaction, a court must "inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent . . . thereby endeavoring to implement congressional objectives without extending the reach of the statute beyond its intended limits." 411 U.S. 582, 594-595 (1973). In *Foremost-McKesson*, this Court cautioned against adopting an approach to Section 16(b) liability "that is not consistent with the premises upon which

Congress enacted the section." 423 U.S. at 243. Accordingly, the Second Circuit's decision followed Supreme Court precedent on statutory interpretation by considering in its analysis of beneficial ownership Congress' purpose in enacting Section 16(b).

Petitioner also contends that the Second Circuit misconstrued the policy underlying the "within sixty days" provision contained in Rule 13d-3's definition of beneficial ownership. Petitioner argues that the Second Circuit improperly focused on "the right to acquire the ability to control" within 60 days, as opposed to focusing on the ability of Southbrook to "affect control" through *seriatim* conversions of small blocks of Preferred Stock over sixty days.[4] (Pet. at 7.) Petitioner's argument misrepresents the SEC's reason for including the "within sixty days" limitation in Rule 13d-3 and the Second Circuit's analysis of this Rule.

As the SEC explained in its Release issued in 1978 ("1978 Release"), Rule 13d-3(d)(1)(i) deems a person to be a beneficial owner of a security if he has the " 'right to acquire beneficial ownership of such security, at any time within sixty

4. Petitioner does not raise a valid issue to the extent he is arguing that Southbrook should be deemed the beneficial owner of more than 10% of the Common Stock because it could "affect control" by serially converting small blocks of Preferred Stock into Common Stock, and then transferring those small blocks of Common Stock to a single investor who would eventually amass a 10% block of Common Stock. Rule 13d contains a "group" theory of liability, which deems an investor the beneficial owner of transferred stock only if it and the transferee "agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer. . . ." 17 C.F.R. 240.13d-5(b)(1). There was no claim that such transfers occurred or that such a "group" agreement existed between Southbrook and some third party.

days, through: . . . conversion of a convertible security. . . .' " *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Securities Exchange Act of 1934, Release No. 14692, 1978 SEC LEXIS 1716, at *14 (April 21, 1978). The 1978 Release explains that "when sixty days or less are left until the right to acquire may be exercised . . . the ability of the holder of such right to affect control is sufficient to warrant the imposition of . . ." insider status. *Id.* at *15. The corollary to this principle is that "as the point in time in which the right to acquire may come to fruition is extended into the future the relation of the right's ability to influence control is correspondingly attenuated." *Id.*

The Second Circuit recognized both of these principles in its analysis of Petitioner's *seriatim* conversion theory. The Court first noted that the right to acquire control of a large block of stock within 60 days conferred on the investor "the power over corporate affairs associated with significant equity ownership," which "implicates access to inside information and the potential for insider trading." (Op. at A-10.) After correctly quoting from the 1978 Release, the Court went on to explain that the 1978 Release establishes that, in incorporating the "within sixty days" provision, the SEC "was contemplating a time limitation in connection with the right to acquire the ability to control." (Op. at A-10.)

Insider status would be irrefutably conferred, as a matter of law, only where the right to acquire the Common Stock through conversion could result in Southbrook owning a 10% block of Common Stock within 60 days. (*Id.*) The "within sixty days" provision is not a direction to aggregate serial purchases (and ignore any sales) over 60 days. That notion finds no support in the language of Section 16(b) or Rule 13d, relevant legislative history or the

precedents of this Court. Rather, the "within sixty days" provision is an acknowledgment that an investor who has the "right to acquire" a 10% block of stock within a short period may have the ability to "affect control" and, correspondingly, have access to inside information.

The Second Circuit did not ignore the issue of whether Southbrook had the ability to "affect control" by its "right to acquire" Common Stock through conversion, as Petitioner contends. The Court simply found that Southbrook did not have the ability to "affect control" through serial conversions because the Conversion Cap prevented Southbrook from having "the 'right to acquire' more than 4.9% of ImmunoGen common stock 'within sixty days' of each divestment." (Op. at A-11.) The Second Circuit analysis comports with the purpose of the "within sixty days" provision, and the SEC's interpretation of its own Rule supports the Second Circuit's view. Both adhere to this Court's instruction that Section 16(b) operates only "within narrowly drawn limits." (*Id.* quoting *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976).)

### B. The Second Circuit's Decision Does Not Conflict with This Court's Decisions on the Deference To Be Afforded an Agency's Interpretation of Its Own Rules In an *Amicus* Brief

Petitioner also argues that the Second Circuit applied the wrong standard in determining the level of deference to be given the SEC's interpretation of its own rules. According to Petitioner, the Second Circuit should not have applied the deference standard set forth in *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000), which, in turn, is based upon the deference standard set forth by this Court in

*Auer v. Robbins*, 519 U.S. 452 (1997).[5] Petitioner contends that the Second Circuit should have undertaken the analysis employed by this Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), to determine the appropriate level of deference. The bases of the Second Circuit's opinion is mischaracterized by Petitioner, and the deference standard Petitioner advocates is, under the circumstances of this case, incorrect.

While the Second Circuit recites the *Auer* deference standard and notes that the SEC's *amicus* "supports [Southbrook's] reading of [Rule 13d-3]," the Second Circuit also made clear that it had independently analyzed the Rule and determined that the SEC's position "comports with our interpretation. . . ." (Op. at A-11.) The Petitioner completely ignores this portion of the opinion.

Even assuming the Second Circuit did not conduct its own analysis, it set forth the appropriate deference standard. The *Auer* standard is to be applied to circumstances, as here, where an agency interprets its own rules. 519 U.S. at 462 (holding that where the rule at issue "is a creature of the [agency's] own regulations, [the agency's] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation' "); *see also Roberston v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (same); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (same). In contrast, *Mead Corp.*, concerned rulings issued by the United States

5. Contrary to Petitioner's contentions, the Second Circuit did not apply the deference standard from *Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984), which properly is applied to an administrative agency's interpretation of an ambiguous statute that it administers. *Id.* at 842-843.

Customs Service, which Congress did not intend to have the force of law. 533 U.S. at 232. Thus, these rulings were held not to be entitled to the level of deference mandated by *Auer*. *Id.* at 220-228; *see also Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (considering the level of deference to be afforded Fair Labor Administrator's informal bulletins and rulings). Petitioner's argument based on *Mead Corp.*, is inapposite.

Equally unavailing is Petitioner's argument that this Court's decisions in *Foremost-McKesson* and *Reliance Electric Co. v. Emerson Electric Co.* require a different deference standard. In those cases, the Court rejected the SEC's interpretation of Section 16(b), because "the SEC's own rules undercut such interpretation" and the SEC's interpretation "not only strain[ed], but flatly contradict[ed], the words of the statute." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 427-28 (1972); *see Foremost-McKesson*, 423 U.S. at 260. The SEC in this case was neither interpreting a congressional statute (in which case, its view would be afforded less deference), nor was it advocating an interpretation that is contradicted by the statute's words or the Commission's rules. As discussed above, the SEC's view as expressed to the Second Circuit was clearly supported by the 1978 Release and by this Court's interpretation of Section 16(b) and Section 13(d).

Petitioner also argues that it is a violation of the Constitution's Separation of Powers doctrine for the judiciary to afford binding deference to the SEC's interpretation of its rules. Petitioner ignores that the Second Circuit reached an independent decision based on its own analysis of the SEC rule at issue and adopted the SEC's view because it comported with the Court's own view. Nevertheless,

assuming the Second Circuit merely applied the *Auer* standard, it did not abdicate complete authority to the SEC to interpret its own rules. The Court, under the *Auer* standard, still would have to evaluate whether the SEC's view was "plainly erroneous or inconsistent with the regulations." If the SEC's interpretation of the rule failed to meet that standard, the Second Circuit would not have endorsed it. The Second Circuit never relinquished its judicial authority to the SEC.

## II. The Second Circuit's Decision Does Not Conflict With Decisions of Other Courts of Appeals

### A. The Deference Standard Identified By The Second Circuit Does Not Conflict With A Decision of the Seventh Circuit

Petitioner argues that the Second Circuit's decision conflicts with a decision in the Seventh Circuit, which supposedly held that an administrative agency's interpretation of its rules, 23 years after the rule was promulgated, is not entitled to deference. *See Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994). Once again, Petitioner ignores that the Second Circuit conducted its own analysis of Rule 13d-3 and adopted the SEC's interpretation because it comported with the Court's own view. The deference standard, therefore, is irrelevant.

But even if the deference standard were relevant, the Second Circuit's decision does not conflict with *Atchison*. In that case, the Seventh Circuit was analyzing "interpretive rules," which are rules issued by an agency that lacks rule-making authority. The Seventh Circuit concluded that interpretative rules are not entitled to the same level of

deference granted to agency rules promulgated by an agency with rule-making authority. *Id.* The *Atchison* Court ultimately afforded the agency's view of its "interpretive rules" no deference because, in addition to applying a lower deference standard, it found that the agency's view was a "post-hoc rationalization," which was "inconsistent with twenty-three years of agency enforcement," and unsupported by "administrative document[s] . . . issued contemporaneously with the passage of the statute." *Id.* at 442. No such finding can legitimately be made here, and unlike the agency in *Atchison*, the SEC has rule-making authority.

### B. The Second Circuit Decision Does Not Conflict With Decisions in Other Circuits on the Issue of Sham Transactions

Petitioner also argues that a Seventh Circuit decision and a First Circuit decision conflict with the Second Circuit's rejection of Petitioner's argument that the Conversion Cap is void under the "sham transaction" doctrine. Neither the Seventh nor First Circuit has held that conversion caps represent sham transactions.

Under the "sham transaction" doctrine, an investor will be deemed the beneficial owner of stock, regardless of the form of the underlying transaction, if the essential rights of ownership of the underlying stock have been passed to the investor. *Bershad v. McDonough*, 428 F.2d 693, 697-98 (7th Cir. 1970) (finding "sham transactions" where shares referenced in option were endorsed in blank for transfer to option holder, option holder received irrevocable proxy to vote shares, and option holder's board nominees replaced that of option issuer); *cf. Riseman v. Orion Research, Inc.*, 749 F.2d 915, 921 (1st Cir. 1984) (holding that an investor

shall be deemed to have purchased common stock where investor held option that created irrevocable obligation to receive common stock although formalities to stock transfer had not yet occurred).

The Conversion Cap in this case does not resemble the sort of transaction that falls within the reach of the "sham transaction" doctrine. Nor is Section 16(b) liability triggered simply by the fact that Southbrook and ImmunoGen sought to structure their transaction to avoid application of that doctrine. This Court has held that "[l]iability cannot be imposed simply because the investor structured his transaction with the intent of avoiding liability under § 16(b)." *Reliance Elec.*, 404 U.S. at 422. That is precisely the circumstance here, as the Second Circuit pointed out.

## III. The Second Circuit's Decision Does Not Raise Issues of National Importance

### A. The Second Circuit's Decision Does Not Conflict With Section 29(a) of the Exchange Act

Petitioner argues that the Conversion Cap raises issues of national importance because it conceals material facts from investors and violates Section 29(a) of the Exchange Act. First, the details of Southbrook's transaction, including the Conversion Cap, were fully disclosed in various filings by ImmunoGen with the SEC under the Securities Act of 1933 and Exchange Act, as well as in ImmunoGen's 1997 proxy statement for its annual stockholders meeting. (*See e.g.* ImmunoGen Form 10-Q for the quarterly period ending September 30, 1996 (J. A. at A-242-328); ImmunoGen Proxy Statement, dated Oct. 10, 1997, at 3 Fn. 4 (J. A. at A-333).)

Second, Section 29(a) is inapplicable, as the District Court held and the Second Circuit affirmed. Section 29(a) provides that "[a]ny condition, stipulation or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulations thereunder . . . shall be void." 15 U.S.C. § 78cc(a). Courts apply this section when the parties to a transaction that violates the law expressly waive compliance with the violated law. *E.g. Harsco Corp. v. Segui*, 91 F.3d 337 (2d Cir. 1996) (holding stipulation void that waives compliance with Exchange Act); *cf. McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1050-51 (2d Cir. 1995) (holding provision void that expressly waived "substantive rights under the securities laws"). There is no agreement in this case providing that Southbrook may own more than 10% of the Common Stock and not report it under Sections 16(a) or 13(d), or that Southbrook would not be liable for short-swing trading under Section 16(b). The Conversion Cap merely prevents Southbrook from owning more than 4.9% of the Common Stock.

### B. SEC Rule 13d-3 Is Not Inconsistent With Section 16(b)

Petitioner argues that if the Second Circuit's interpretation of Rule 13d-3 is correct, it is inconsistent with Section 16(b)'s purpose. The SEC, Petitioner contends, therefore, exceeded its authority to promulgate rules pursuant to Section 3(b) of the Exchange Act by adopting Rule 13d-3's definition of beneficial ownership for Section 16(b). Rule 13d-3's definition of beneficial ownership and the Second Circuit's interpretation of that rule are entirely consistent with Section 16(b)'s purpose.

This Court has explained that "Congress passed § 16(b) of the 1934 Act to 'preven[t] the unfair use of information which may have been obtained by [a] beneficial owner, director, or officer by reason of his relationship to the issuer.'" *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). "Prohibiting short-swing trading by insiders with nonpublic information was an important part of Congress' plan. . . ." *Id.* To eliminate such trading, Section 16(b) "imposes a form of strict liability on" certain statutory insiders. *Id.* at 123.

Because the statute imposes strict liability without regard to fault, Congress fixed " 'narrowly drawn limits' on the class of corporate insiders who may be defendants under Section 16(b)." *Id.* A narrow construction of the statute is required "even though in some cases a broader view of statutory liability could work to eliminate an 'evil that Congress sought to correct through Section 16(b).' " *Id.* For this reason, insider status coupled with the irrebutable presumption of insider trading would be imposed upon Southbrook only where it has had the right to acquire, both at the purchase and the sale in question, a 10% block of the Common Stock within 60 days. *See id.*

Southbrook could not assemble, within 60 days or at any other time, a block of stock large enough to exceed the threshold Congress set as justifying Section 16(b)'s presumption of trading on inside information. Accordingly, a definition of beneficial ownership that presumes possession of inside information based on the right to acquire a 10% block of common stock within sixty days, as opposed to the ability to trade actively in small blocks of stock, adheres to Congress' purpose. As this Court held in *Foremost-McKesson*, "trading by mere stockholders was viewed [by Congress] as being subject to abuse only when the size

of their holdings afforded the potential for access to corporate information." 423 U.S. at 253. The SEC did not exceed its authority in promulgating Rule 13d-3.

## CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT TEITELBAUM
*Counsel of Record*
NOAH WEISSMAN
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

*Attorneys for Respondent*
*Southbrook International Investments, Ltd.*

# APPENDIX

# APPENDIX — BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE, IN SUPPORT OF APPELLEE ON ISSUES ADDRESSED

**[Omitted here but submitted separately as Lodging]**

Supreme Court, U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

No. 01-1272

IN THE

# Supreme Court of the United States

MARK LEVY, Derivatively on behalf of ImmunoGen, Inc.,

*Petitioner,*

*v.*

SOUTHBROOK INTERNATIONAL INVESTMENTS, LTD.,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## BRIEF IN OPPOSITION FOR RESPONDENT IMMUNOGEN, INC.

PETER M. SAPAROFF
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

JAMES N. BENEDICT
*Counsel of Record*
HILARY LANE
CLIFFORD CHANCE ROGERS & WELLS LLP
200 Park Avenue
New York, New York 10166
(212) 878-8000

*Attorneys for Respondent ImmunoGen, Inc.*

173288

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

3P

## CORPORATE DISCLOSURE STATEMENT

ImmunoGen, Inc. ("ImmunoGen") has no parent corporation, and no publicly held company owns 10% or more of ImmunoGen's stock.

## ARGUMENT

ImmunoGen is a nominal defendant in this action, which petitioner Mark Levy brought derivatively on behalf of ImmunoGen against respondent Southbrook International Investments, Ltd. ("Southbrook"). ImmunoGen adopts and incorporates herein by reference the Brief submitted by Southbrook in opposition to Levy's Petition for a writ of certiorari. For each and all of the reasons set forth therein, ImmunoGen respectfully submits that Levy's petition should be denied.

Respectfully submitted,

JAMES N. BENEDICT
*Counsel of Record*
HILARY LANE
CLIFFORD CHANCE ROGERS
& WELLS LLP
200 Park Avenue
New York, New York 10166
(212) 878-8000

PETER M. SAPAROFF
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
One Financial Center
Boston, Massachusetts 02111
(617) 542-6000

*Attorneys for Respondent*
*ImmunoGen, Inc.*